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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. ~~771~~ 68 (see No. 93)

LESTER E. BANNING,
Petitioner,

vs.

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LLOYD T. BAILEY,
325 Thompson Bldg.,
Hot Springs, Arkansas.

MICHAEL H. LYONS,
105 W. Madison Street,
Chicago, Illinois.

HARRISON T. WATSON,
1919 Dime Bldg.,
Detroit 26, Michigan,
Counsel for Petitioner.

Midwest Law Printing Co., 340 W. Huron St., Chicago

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No.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Lester E. Banning respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on April 5, 1949.

A.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 5, 1949 (R. 405). The jurisdiction of this court is invoked under Section 1254(1) of Title 28 United States Code as enacted by the 80th Congress—Second Session, 1948, effective on September 1, 1948.

B.

Statement of the Matter Involved.

This case involves a suit for damages instituted under the provision of the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, *et seq.*, by Lester E. Banning, employed by the Detroit, Toledo & Ironton Railroad Company as a brakeman or switchman, for injuries sustained by him while engaged in the performance of his duties in the defendant's railroad yards in Trenton, Michigan, which he alleges resulted from the negligence of the railroad company.

The Court of Appeals has found that the evidence warrants the inference that the accident occurred under the following circumstances:

Appellee Banning was employed by the Appellant in July, 1945 as a brakeman. At the time of the accident on September 23, 1946, he was working as a member of a switching crew which was making up a freight train. It had been raining all day. During the evening, the crew took a Diesel engine into a siding leading to a gravel quarry and picked up about 8 gondola cars loaded with gravel. The engine backed out of the siding, temporarily dropped the gondola cars and continued backward into another siding behind a distillery to pick up two box cars.

Banning performed the coupling in this operation. In doing so he alighted from the engine and walked around on the road bed. At this point there was a thin layer of mud about two inches thick and Banning got mud on his boots. The crew worked on this siding for about 15 minutes. After coupling the cars, Banning got upon the engine and stayed there about 3 or 4 minutes before it pulled out. He was in a position where he could talk to the engineer and fireman. He was not on the ground again in that area.

The engine pulled the two box cars back to the location of the gondola cars where it again coupled with them. Banning made this coupling, but the ground was solid road bed with no mud. The engine then continued its backward course to the south, out of the quarry siding, into the main line, pushing the two cars from the distillery and pulling the cars from the quarry. The cars from the quarry were then cut off and left standing with brakes locked. The engine continued backing southwardly down the main line pushing the two cars to a point about 1,000 feet to the south of where it had left the other cars standing. Then the crew proceeded to make a drop or a flying switch in the following manner: The engine started northward pulling the two cars toward the standing cars and got up a speed of 12 to 14 miles per hour. It then slowed down and created a slack between it and the two cars which were uncoupled from the engine. The engine then speeded up and passed over a switch leading from the main line down a dead end siding. After the engine went off into the siding the switch was immediately thrown back so that the free running cars following the engine passed on and continued down the main line. They would thus run into and become coupled to the standing cars from the quarry, eliminating the en-

gine from the middle. The combined cars were to be then pushed to the yards.

Banning was then on the front end of the box car nearest the engine. He uncoupled the cars from the engine when the engine created slack. He then climbed a ladder on the moving car to a brake platform where it was his duty to operate the hand brake in order to control the speed of the box cars and slow them down so that they would make an easy contact and an automatic coupling with the standing cars. Banning claims that although he continuously applied the brake the cars had been pushed at such a speed that he only succeeeded in slowing them to a speed of six or seven miles per hour when they hit the standing cars, and that the resulting impact and crash threw him off the brake platform on to the gravel car and then down on to the road bed. At the time of the collision he was standing on the platform with a firm foothold and with both hands on the brake wheel. He described the impact as having jerked his hands and feet loose. The accident occurred about 8:00 P. M. There was a misting or light rain at the time. Banning received injuries to his back.

At the close of all the evidence the Appellant moved for a directed verdict. The Court reserved decision on the motion and submitted the case to the jury. The jury found for the appellee in the sum of $41,000.00. Appellant's motions for judgment *non obstante veredicto* and for a new trial were overruled and judgment was entered on the verdict.

The complaint filed by Petitioner contained both general and specific allegations of negligence (R1-Amended R13-15. *The complaint was amended only to aver that petitioner slipped from the braking platform of the car instead of, as originally alleged, from a ladder rung on the*

end of the car), the third paragraph was based generally on the theory that respondent failed to furnish petitioner a reasonably safe place in which to work and recited in substance that respondent failed in its duty to petitioner by causing him to perform switching operations and work upon the ground where it was muddy, wet and slippery so that his boots became immersed and covered with slippery, greasy mud, as a result of which petitioner's feet were caused to slip from the braking platform of a box car when said box car came in violent and unusual collision with a standing car, causing plaintiff to be thrown from his position on said car to the ground and injured. Following this general allegation of negligence (R. 3) the complaint alleges several particular acts of negligence upon which there was no proof, save the natural inferences to be drawn from the evidence generally, except as to the violent collision and the muddy condition of the ground and petitioner's boots.

Petitioner's evidence that he was required to work in slippery mud for about 15 minutes on the "distillery switch" and that his boots were covered with mud when he mounted the braking platform which was wet; that along the main track there was no mud as the pathway was covered with gravel and cinders, and that it was a rainy, misty night; that in falling, petitioner first struck the end of a gondola loaded with gravel and bounced from there to the ground; that petitioner sustained a fracture of the 8th, 9th, 11th and 12th dorsal vertebrae and that between the 10th and 11th and the 11th and 12th dorsal vertebrae there was alteration of the space of the inter-vertebrial space was uncontroverted. The evidence as to other circumstances tended to show that petitioner was dislodged from the braking platform when the box car he was riding, which was then travelling 6

to 7 miles per hour, came in collision with cars standing on the main line loaded with gravel and with the brakes set. The case was submitted to the jury by the District Court on the question of negligence on the part of the railroad and contributory negligence on the part of petitioner (R. 329-343), resulting in a verdict in favor of plaintiff (R. 349). The Court overruled a motion of respondent to set aside the verdict and entered judgment for plaintiff (R. 390).

On appeal the Court of Appeals for the Sixth Circuit reversed the decision of the District Court and ordered the case remanded for a new trial, holding:

> "• • • Whether the crash contact was the result of excessive speed, or caused by Banning's failure to properly use the braking mechanism, presented a disputed question of fact. The District Judge was correct in submitting this issue to the jury",

but held:

> "The evidence respecting whether the Appellant was negligent in requiring Banning to work under muddy conditions resulting in muddy boots which caused him to slip and fall from the braking platform was not sufficient to take that issue to the jury. • • • Nor does the evidence show in any way that Appellee was required to work thereafter without being afforded the opportunity to counteract any danger resulting therefrom. He had ample opportunity while waiting on the engine to clean his boots of mud. • • • Only the issue of excessive speed should have been so submitted. The verdict rendered by the jury was a general one with no way to determine on which of the two issues it was based." The Court further stated: "Appellee invokes the 'unitary rule of negligence' to justify the submission of the mud issue, contending that the mud, rain, wet braking platform and speed of the cars

formed one continuous chain of circumstances which led to his injury. The case could have been presented and properly submitted to the jury in that manner" (R. 410).

The Court further stated that the two incidents were entirely separate and distinct and the Judge erred in submitting both to the jury and that the Appellant is entitled to a new trial.

The part of the instructions of the District Court which was criticized by the Court of Appeals, is in substance (R. 331):

Plaintiff has charged in his complaint that the defendant failed to furnish him a safe place in which to work, in two respects; first, that he was required to work in the yard in muddy conditions so that his boots became slippery and covered with mud; and second, that defendant dropped the car upon which plaintiff was riding in the performance of his duties at such a high, dangerous and excessive rate of speed that plaintiff did not have the opportunity to bring it to a stop by means of the braking apparatus * * * that unless you find the defendant was negligent in one or the other respects as claimed by the plaintiff, you should find for the defendant.

The Court of Appeals further held that there was sufficient evidence to show that plaintiff was injured when knocked from the brake platform due to the violent collision.

C.

Questions Presented.

1. Whether a general verdict should be upheld in a case involving two or more issues or theories, when one issue or theory has been properly submitted to the jury and is sustained by the evidence.

2. Whether or not, under the circumstances, there was sufficient evidence, together with the natural inferences flowing therefrom, to justify the submission of the question to the jury on the hypothesis that the muddy condition in which petitioner was compelled to work could or might have contributed to his dislodgement from the braking platform.

3. Whether there was sufficient evidence of a causal connection between the slippery mud on petitioner's boots, the wet braking platform, the violent collision resulting in injury to petitioner to justify submission of that question to the jury over defendant's objections under the "unitary rule of negligence."

D.

Reasons Relied On for Allowance of Writ.

1. The United States Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the decision of other Court of Appeals on the same matter, and a decision in conflict with a decision of this Court, namely: that a general verdict should be upheld in a case in which there are two or more issues or theories when one issue or theory has been properly submitted to the jury and is sustained by the evidence if, in the opinion of the Court, another issue or theory has been improperly submitted to the jury and should have been withdrawn.

2. That there was sufficient evidence, taking into consideration the surrounding circumstances and the natural inferences flowing therefrom, for the jury to have found that the muddy conditions contributed to petitioner's dislodgment from the wet braking platform and contributed to his injury.

3. That the evidence on the whole, including the natural inference to be drawn therefrom, showed a chain of circumstances which proximately caused and contributed to petitioner's injury.

A supporting brief accompanies this petition.

Wherefore, petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered by that Court in this case on April 5, 1949, and that said order be reversed by this honorable Court and that your petitioner may have such other and further relief as may be deemed proper by this honorable Court.

LLOYD T. BAILEY,
325 Thompson Bldg.,
Hot Springs, Arkansas.

MICHAEL H. LYONS,
105 W. Madison St.,
Chicago, Illinois.

HARRISON T. WATSON,
1919 Dime Building,
Detroit 26, Michigan.

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OCTOBER TERM, 1948.

No.

LESTER E. BANNING,
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vs.

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the United States Court of Appeals, Sixth Circuit (R. 405), decided April 5, 1949, is still unreported. Memorandum of grounds for denial of motion for a new trial of the District Court of the United

States for the Eastern District of Michigan, Southern Division, filed March 24, 1948 (R. 382).

II.

Jurisdiction.

The jurisdiction of this court is invoked under Section 1254(1) of Title 28 U.S.C.A. as enacted by the 80th Congress—Second Session, 1948, effective on September 1, 1948. The judgment of the United States Court of Appeals, Sixth Circuit, to be reviewed was entered on April 5, 1949 (R. 405).

III.

Statement of the Case.

A statement of the case appears under heading "B", page 2 of the petition for writ of certiorari. We feel it is not necessary to repeat, but the same is referred to with the request that it be considered as herein incorporated by reference.

IV.

Questions Presented.

The questions specifically presented by the petition for writ of certiorari appear under heading "C", page 7 of the petition, and in the interest of brevity, they are not repeated, but are referred to with the request they be herein incorporated by reference.

V.

ARGUMENT.

Summary of Argument.

1. The United States Court of Appeals for the Sixth Circuit held that the evidence in this case is sufficient to support the verdict of the jury on one issue which was properly submitted. The verdict should, therefore, be upheld even though another issue may have been improperly submitted.

2. The issue relating to the slippery, muddy roadbed upon which petitioner was required to work was properly submitted to the jury and was sufficient evidence to sustain a verdict founded thereon.

3. There was sufficient evidence to show a causal connection between the slippery mud on petitioner's boots, the wet braking platform, the violent collision and petitioner's injury.

1. The Verdict of the Jury Should Be Upheld on Issues Properly Submitted.

The Court of Appeals concedes that the evidence produced at the trial of this case was sufficient to sustain a verdict of negligence against the defendant as to the violent collision between the car upon which petitioner was riding and the standing cars on the main line track, and concedes that the issue raised by this evidence was properly submitted to the jury and indicates that had no other issue been raised it would have affirmed the judgment. The Court of Appeals also holds that had the question of the violent collision, the muddy conditions

of the roadbed and petitioner's boots, been submitted to the jury in one bundle it would have affirmed the judgment. It holds, however, that because the petitioner alleged that defendant failed to furnish petitioner a reasonably safe place in which to work *"in two respects"* the judgment must be reversed, because there was no causal connection between the muddy roadbed, the muddy boots, the wet braking platform, the collision and petitioner's injury; that the issue of the muddy boots was improperly submitted to the jury and the general verdict could not be upheld, as it was impossible to say whether it was based upon the issue properly submitted or upon the issue that should have been withdrawn.

We concede that until recently there has been a decided conflict of authority upon the question as to whether error affecting only one of two or more issues is prejudicial. We respectfully submit that this Court, in recent cases, has approved the doctrine that, if one issue or theory is properly submitted to the jury and is sustained by evidence, a general verdict should be upheld even though another issue may have been improperly submitted. In the case of *Bigelow* v. *R.K.O. Radio Pictures,* 327 (U. S.) 251, 66 (S. Ct.) 574, in reversing a judgment of the Court of Appeals, based upon a general verdict where two theories of damages were submitted to the jury, said on page 259:

> "In submitting the two classes of evidence of damage which we have detailed, the trial court stated to the jury:
>
> 'Plaintiffs seek to recover damages for the alleged acts of the defendants on one of two theories' * * * 'If plaintiffs have been injured by the alleged acts of the defendants, they must choose one or the other of the said two theories of determining damages or the amount of damage.'"

and on page 266 this Court further said:

> "We conclude that there was evidence to support a verdict for damages on at least one theory on which the case was submitted to the jury. We do not imply the verdict could not be supported by some other theory."

That this rule has become generally recognized as the law is further evidenced by the decision of the Court of Appeals, 7th Circuit, in the case of *Larsen* v. *Chicago & N. W. Ry. Co.*, 171 Fed. 2nd 841, an action brought under the Federal Employers' Liability Act. The principal question in that case was whether there was sufficient evidence to support a jury verdict in either of the two charges of negligence on which the defendant was found guilty and the court held that but "one charge of negligence is sufficient to sustain a verdict," citing *Miller* v. *Advance Transportation Company*, 7 Cir., 126 F. 2nd 442, 446, certiorari denied, 63 S. Ct. 32, 317 U. S. 641.

Prior to the recent cases above cited this Court apparently gave tacit approval to the doctrine that if one issue is properly submitted to the jury and is sustained by the evidence, a general verdict should be upheld even though another issue may be improperly submitted, *Tiller* v. *Atlantic Coast Line Ry. Co.*, 323 U. S. 574, 65 S. Ct. 421; *Cross* v. *Ryan* (C.C.A. 7th, 1941), 124 F. 2d 83, certiorari denied (1942), 316 U. S. 682, 62 S. Ct. 1269, 86 L. Ed. 1755; *Miller* v. *Advance Transp. Co.* (C.C.A. 7th, 1942), 126 F. 2d 442, certiorari denied (1942), 317 U. S. 641, 63 S. Ct. 32, 87 L. Ed. 516.

Applying this rule to the instant case, in which the Court of Appeals concedes the evidence presented was sufficient to justify the submission of the question of negligence to the jury, the general verdict should be upheld even though, as determined by the Court of Appeals, the other issue may have been improperly submitted.

2. Issue Involving Muddy Condition Where Petitioner Was Required to Work.

That there was substantial evidence of mud is entirely undisputed. The plaintiff in the performance of his duties had been necessarily wading in mud on the back track (R. 34) and here was mud on his feet at the time he mounted to the brake platform (R. 53). It was rainy and misty at the time of the occurrence and the braking platform was wet. Along the main line there was no mud. The roadbed was paved with gravel and cinders (R. 36). These facts were undisputed. We submit from this evidence, the jury had a right to reasonably reach the inference that if the defendant could provide petitioner with a solid roadbed of gravel and cinders along the main line that it could also have furnished him a solid roadbed upon which to perform his duties on the back track, and, in that respect, defendant was negligent; and the further natural and reasonable inference that the muddy, slippery condition of petitioner's boots contributed to his losing his footing on the braking platform and could have added to plaintiff's danger. If petitioner did have time and opportunity to clean the mud from his boots as suggested by the Court of Appeals that fact was presented to the jury and considered by them and went only to his contributory negligence, if any.

In the case of *Tennant* v. *Peoria & T. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, this court said on page 35:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It

weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable (cases cited). That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In the case of *Lavender* v. *Kurn,* 327 U. S. 645, 66 S. Ct. 740, this court said on page 653:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The above rule of law was also followed by this Court in *Ellis* v. *Union Pac. R. Co.,* 329 U. S. 649, 67 S. Ct. 598. This principle of law was also enunciated in the case of *L. & N. R. Co.* v. *Botts,* decided on March 14, 1949, 173 F. 2nd 164 by the Court of Appeals for the Eighth Circuit. In this case the Court very ably and exhaustively

reviewed the important cases on the subject and finally rendered a decision which appears to us to be contrary to the opinion of the Circuit Court in the case at bar.

We strongly feel that in view of the foregoing rule of law the Court of Appeals should have affirmed petitioner's judgment.

3. Negligence of the Defendant Should Be Determined By Viewing Its Conduct As a Whole.

Briefly, what occurred just prior to petitioner's injury was that after they reached Trenton, defendant did some switching leaving 8 or 10 gondolas loaded with gravel on the main track with the brakes set, then they proceeded to switch two cars from the back track where plaintiff was required to get on the ground and walk in the mud, two inches of slushy mud (R. 34) in assisting in picking up these two cars. Plaintiff charged that he was on the back track about 15 minutes. He then mounted the stirrup of the car next to the engine and they pulled out on the main track which placed the diesel locomotive between the two cars it had hold of and the gravel cars on the main line. In order to get the locomotive on the end of the train, it was necessary to make a drop or flying switch of the two cars which was done according to the evidence by getting up a speed of around 12 miles per hour, then slacking off enough to allow petitioner, who had been riding the stirrup of the car next to the locomotive, to uncouple the two cars from the locomotive which was then run in on a siding and the switch closed before the two cars on which plaintiff was riding reached the switch so that those two cars would go down the main line and contact the standing gravel cars. After plaintiff had uncoupled the locomotive, he proceeded up the ladder to the braking platform where he applied the brakes in an

attempt to stop the cars before contacting the standing cars but was unable to do so, as a result of which the two cars on which plaintiff was riding struck the standing gravel cars when going at a speed of 6 to 7 miles per hour and plaintiff was knocked from the platform, landed on his back on the edge of the gravel car, bounced from there to the ground where he landed on his back and was injured. Inasmuch as the Court of Appeals concedes that there was sufficient evidence to go to the jury on the question of the rough handling of the two cars, we will not take the Court's time to go into the details of the evidence in that respect.

Petitioner contends that there was sufficient evidence to show a causal connection between the slippery, muddy roadbed upon which petitioner was required to work, the wet braking platform and the violent collision; that the above events and the natural inferences to be drawn therefrom, constitute one continuous chain of events leading to petitioner's injury. In the case of *Blair* v. *B. & O. Ry. Co.*, 323 U. S. 600, 65 S. Ct. 545 (1945), this Court said on page 604:

> "We think that there was sufficient evidence to submit to the jury the question of negligence posed by the company. The duty of the employer 'becomes more imperative as the risk increases.' The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pacific Ry. Co.* v. *Hadley*, 246 U. S. 330, 332, 333; 38 S. Ct. 318, 319; 62 L. Ed. 751. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern and each impart character to the others. * * * Consequently, we think the jury, and not the court, should finally determine the issues."

In the case of *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350, 63 S. Ct. 1062, this Court said on page 353:

"The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller* v. *Atlantic Coast Line R. Co., supra*) as well as issues involving controverted evidence. (*Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478; *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235. To withdraw such a question from the jury is to usurp its function.

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' *Jacob* v. *New York City*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. * * *To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In the case of *Wilkerson* v. *McCarthy, et al.*, decided by this Court on January 31, 1949, ... U. S. ....., 69 S. Ct. 413, this court held on page 418:

"In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate

stands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence."

In the case of *Coray* v. *Southern Pac. Co.*, decided by this court on January 3, 1949, ... U. S. ....., 69 S. Ct. 275, which was an action brought under the provisions of the Safety Appliance Act and the Federal Employers' Liability Act this court in reversing and remanding the judgment of the State Supreme Court of Utah, held on page 277:

> "These air brakes were defective; for this reason alone the train suddenly and unexpectedly stopped; a motor track car following at about the same rate of speed and operated by an employee looking in another direction, crashed into the train; all of these circumstances were inseparably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances."

Under the rule of law laid down in these cases we seriously contend that the circumstances leading up to plaintiff's injury from the time he was compelled to wade in the sloppy, slippery mud until he was thrown from the braking platform and injured formed one continuous chain of circumstances so closely interwoven as to form a single pattern and that each imparted character to the other, and that this cause was properly submitted to the jury by the District Court.

Conclusion.

In conclusion, counsel for the petitioner respectfully submit, for the reasons herein set out, a writ of certiorari should be granted the petitioner and that this court should review and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Lloyd T. Bailey,
Michael H. Lyons,
Harrison T. Watson,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 171 68

LESTER E. BANNING,
Petitioner and Cross-Respondent,

vs.

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S ANSWER FILED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LLOYD T. BAILEY,
325 Thompson Bldg.,
Hot Springs, Arkansas.

MICHAEL H. LYONS,
105 W. Madison Street,
Chicago, Illinois.

HARRISON T. WATSON,
1919 Dime Bldg.,
Detroit 26, Michigan,
Counsel for Petitioner.

Midwest Law Printing Co., DElaware 7-6669

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 771

LESTER E. BANNING,
Petitioner and Cross-Respondent,

vs.

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S ANSWER FILED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Lester E. Banning, by his attorneys, filed his petition in this honorable court asking that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on April 5, 1949. Respondent, through its attorneys, filed its answer in op-

position to the issuance of a writ of certiorari and this reply is addressed to respondent's answer.

Question of Importance.

The question involved is important. If the rule laid down by this Court in the case of *Bigelow* v. *R.K.O. Radio Pictures,* 327 U. S. 251, 66 S. Ct. 574, does not apply to Federal Employers' Liability cases as contended by the respondent, then the precise question presented in our petition for certiorari has never been decided by this Court. If the rule laid down in the *Bigelow* case does apply to Federal Employers' Liability cases then petitioner is entitled to a reversal of the decision of the Court of Appeals Sixth Circuit.

The question involved is purely a question of law governing cases under the Federal Employers' Liability Act, regarding which, there is a diversity of decisions in the United States Court of Appeals. In addition to the cases we cite in our brief in support of our petition for certiorari (see pages 12 to 14) we ask the Court to consider *Stanczak* v. *Pennsylvania R. Co.,* 174 F. 2nd 43, at page 47, where the Court said:

> "There being evidence from which the jury may reasonably have inferred that Stanczak came to his death by one of the means suggested above and upon which to base a finding that such means involved negligence on the part of the appellant under the circumstances shown by the evidence, it is not within the function of this court to go back to the jury's verdict to consider other possible means not involving negligence on the part of appellant (*Lavender* v. *Kurn,* 327 U. S. 645; *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54; *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350)."

Both the petitioner and respondent agree that the decision of the Court of Appeals is in conflict with applicable decisions of other United States Courts of Appeals (see page 4 of respondent's cross-petition) and both respectfully ask that the court take and finally decide the question involved.

The decision of the Court of Appeals in the case at bar is directly opposed to the rule of law governing the presented question as laid down by this court in *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 66 S. Ct. 574 and in the cases of *Stanczak* v. *Pennsylvania Railroad Company,* 7th Cir., 174 F. 2d 43 and *Dryfoos* v. *Scavenger Service Corporation,* 7th Cir., 115 F. 2d 637 (1940).

ARGUMENT.

(For the convenience of the Court we reply to Respondent's answer under corresponding headings.)

Failure to question rulings of Court of Appeals is not fatal to Banning's petition.

Respondent, by its answer, apparently is trying to lead this court to believe that there were two issues acted upon by the Court of Appeals. In fact there were two acts of negligence charged as constituting the act of negligence in failing to furnish plaintiff with a safe place in which to work.

The Court of Appeals set aside a final judgment and granted a new trial on a single, pure question of law, which, if erroneously decided would nullify the new trial and entitle the petitioner here to reinstatement of the judgment of the District Court. This Court in *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421 (1945), granted certiorari in which the principal issue presented was exactly the same as the case at bar, where the Court of Appeals granted a new trial and set aside a judgment obtained by the employee in the District Court on the ground that an erroneous proposition of law had been submitted to the jury. This Court held that the proposition of law as stated by the District Court was correct, set aside the grant of a new trial by the Court of Appeals, and reinstated the judgment entered by the District Court.

In reply to respondent's contention that the Court of Appeals found that the District Court committed three

separate errors in regard to the reception and rejection of testimony, may we say that a reading of the decision of the Court of Appeals not only indicates but says (410):

> "The District Judge accordingly erred in submitting to the jury both the issue of excessive speed and the issue of the muddy conditions under which appellee worked some time prior to the accident. Only the issue of excessive speed should have been so submitted. The verdict rendered by the jury was a general one with no way to determine on which of the two issues it was based. Under such conditions the Appellant is entitled to a new trial."

In discussing the other matters referred to as errors by respondent, which is merely *dictum,* the Court of Appeals said (R. 411):

> "We believe the testimony was improperly admitted."

This was with reference to the testimony of Banning that he had never ridden on a freight car that came in contact with another portion of the train at as high a rate of speed as the one involved in the accident. We submit that the Court of Appeals was ill-advised in making this remark for the reason that under examination by the District Court, without objection on the part of respondent, in answer to the Court's question (R. 96), Petitioner testified:

> Q. (Court) "What difference was there with reference to the contact, if any? Do you understand what I mean by 'contact'? Your car going together with another car."
>
> A. "Yes, sir. There was a great contact. They came together with a greater force than I ever experienced on before. I had been in a similar operation and situation 15-20 times before when we made drops of that sort; after the contact my hands and feet were jerked loose, I knew I was falling but there was nothing to grab there after I was jerked loose."

In other words, the gist of the testimony complained of was in the record without objection.

On page 9 of its brief, respondent complains that its conductor, Mr. Toombs, and its engineer, Mr. Ruetz, were not permitted to testify as to whether the switching movement in question "*was or was not normal*". (Our italics.) We think the court properly sustained our objection to the question and the reasons he gave were logical (R. 235-256). Neither the Court, the lawyers or the jury could possibly have any idea of what these witnesses would consider normal, nor whether the witnesses were testifying, or would have testified, that the making of a flying switch was a normal and usual operation, or, whether the witnesses would have indicated that the speed, considering the surrounding circumstances, was normal. We feel that the evidence of these two witnesses was properly excluded by the court.

The Court of Appeals also criticized the District Court for admitting certain testimony of Dr. Conley as to petitioner's pain, stating that "Dr. Conley's testimony should have been confined to the X-ray pictures without reference to appellee's pain, about which he had no personal knowledge" (R. 412).

We suggest that this criticism was ill-advised. Dr. Conley's evidence on the subject was as follows (Direct examination—R. 145):

> Q. "What I'm getting at, is there sufficient pathology shown by the picture to justify a medical man, basing his opinion on reasonable medical certainty, to say that the man could or could not have such pain?"
>
> A. "I say that the fracture and invasion of the spine are a competent and sufficient cause for pain."

It will be noted that the doctor did not testify that the injured petitioner did suffer pain.

It will be noted from the opinion of the Court of Appeals (R. 410-411) that the rulings of the District Court on the reception and rejection of this evidence was not considered reversible error but that the error relied upon to reverse the judgment was singly and purely a question of law revolving around the two charges of negligence. In other words, the Court of Appeals, in substance, stated that it would not have reversed the judgment of the District Court if the Court had instructed the jury as follows: Plaintiff has charged in his complaint that the defendant failed to furnish him a safe place in which to work *in this respect,* first, that he was directed and required to work in the yard under muddy conditions * * * and second, that defendant dropped the car upon which plaintiff was riding * * * at a dangerous rate of speed * * *", instead of "Plaintiff has charged in his complaint that the defendant failed to furnish him a safe place in which to work *in two respects,* first, that he was directed and required to work in the yard under muddy conditions * * * and second, that defendant dropped the car upon which plaintiff was riding * * * at a dangerous rate of speed * * *".

In other words, the Court of Appeals set aside the verdict of the jury, the judgment of the trial court and directed a new trial because the word "*two*" was used instead of the word "*this*" in the Judge's charge to the jury. The remedies and measure of damages under the Federal Employers' Liability Act, 45 U.S.C.A., 51 *et seq.,* are never positive, never liquidated, and not possibly the subject of pre-determination. The Federal Employers' Liability Act, like all laws, can be only as effective as its enforcement and its practical application.

However, deserving the case, the railroad can, if it desires, sit back and refuse to negotiate a settlement or pay a dollar until a final unappealable judgment has been obtained in the appellate courts. This means that a railroad family, in which the breadwinner has been disabled or killed, may be without any means of support for three years, as in the case at bar, and until the successful termination of the litigation. This creates a *practical problem* intrinsically inherent in the problem of law here at hand. It requires a practical approach and decision.

Following the reversal of the case, the Court of Appeals, by way of *dictum*, suggested that it "*believed* the trial Court erred in rulings on evidence" and suggested that on a retrial the court make opposite rulings. We contend a reading of the opinion of the Court of Appeals will demonstrate that these rulings had no part in the Court's reversal of the case, and, that such rulings were not considered by the Court of Appeals as reversible errors.

On page 10 of its brief, respondent's attorneys argue that certiorari should be denied, which statement is in contravention with their cross-petition for certiorari and their prayer for certiorari on page 40 of their brief. Respondent bases its reason for denying petitioner certiorari upon the dissenting opinion of Justice Roberts in the case of *Bailey* v. *Central Vermont Railroad Co.*, 319 U. S. 350, 63 S. Ct. 1062 (1943). Certiorari has been held to be appropriate to review interlocutory decrees of the Court of Appeals where the question of law involved was deemed to be special and important and where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter or has decided a federal question in a way

probably in conflict with the applicable decisions of the Supreme Court; (See Rule 38-5b of the Rules of the Supreme Court of the United States) and where the position of the petitioner was one in which, if correct, rendered the judgment of the Court of Appeals wholly void. See *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421 (1945).

This Court, following the rule laid down in the *Tiller* case, granted certiorari to review the judgment of the Court of Appeals, Third Circuit, in the case of *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625, 68 S. Ct. 296 (1948). See also *American Construction Co.* v. *Jacksonville T. & K. W. Ry. Co.*, 148 U. S. 372 (37 L. Ed. 486); *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117 (64 L. Ed. 810); *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489 (62 L. Ed. 422); and *U. S.* v. *Gulf Refining Co.*, 268 U. S. 542 (69 L. Ed. 1082).

Respondent, in no brief or argument, has been able to explain why the defendant railroad company could not have supplied petitioner with the same kind of a pathway to work upon along the distillery track as the path along the main line which was dry and composed of gravel and cinders. This condition, together with the rough handling of the train all goes to the proposition of whether defendant railroad company used reasonable care to furnish plaintiff a reasonably safe place in which to work.

For cases upon which we rely we ask the court to see cases cited by us in our original brief (15-17), also *Stanczak* v. *Pennsylvania R. Co.*, 174 F. 2d 43, 47.

This Court may take judicial notice of the ordinary, known occurrences in everyday life which are perfectly apparent and a matter of common knowledge. All that

was necessary to do in making the flying switch was to have just enough speed so that the two cars would clear the switch upon which the engine had passed; it was not necessary, but only a matter of saving time, that the cars were handled at the greater speed in order to make the coupling without another movement.

On page 16 of respondent's answer they complain of the charge to the jury. If the court considers this point, we ask that it read the complete charge which was so weighed in favor of the defendant railroad company that plaintiff entered an objection (R. 345). A reading of the charge of the District Court will disclose that the jury could not possibly have been misled by the charge.

On page 17 of respondent's answer it gives its interpretation of the cases cited in our original brief on pages 13 and 14. We, of course, disagree with the interpretation put upon those cases by respondent and submit that interpretation is not in accord with decisions of this Court and of other Courts of Appeal heretofore cited in this brief.

The Court of Appeals incorrectly decided that the District Court was in error in submitting to the jury the issue of the alleged negligence of the railroad company in that Banning "Was directed and required to work in the yard under muddy conditions so that his boots became slippery and covered with mud."

The foregoing is respondent's second sub-title and is found on page 11 of its brief. Your authors have not changed their position as to the law governing this case. We admit that where no evidence is submitted on an issue standing alone, such issue should not go to the jury. That is exactly the situation in the cases discussed by respond-

ent beginning on page 12. In the *Rashaw* case upon which respondent relies, there were two charges, one that the trestle or bridge was narrow, making a dangerous place in which to work, and the other was that ice had formed upon the ties and right-of-way, as a result of steam escaping from the locomotive in that vicinity. Not only was there no evidence of the icy condition, which was submitted to the jury, but apparently the only witness to testify about the ice was the conductor who stated that there was no steam escaping from the engine at that point.

Likewise in the *Christian* case upon which respondent relies, there were two charges of negligence, one that the crossing where the locomotive jumped the track was in bad repair, and the other, that the engineer on the pusher engine failed to turn the cut-out valve on the air brake system. On the latter charge there was no evidence whatsoever of such failure.

The other case relied upon by respondent is *Katila* v. *B. & O. R. R. Co.* This case supports our position that all the circumstances surrounding and leading up to petitioner's injury were for the jury. Here the Court said, and we quote from page 13 of respondent's brief:

> "* * * there may not be adequate assay of total negligence unless all negligence supported by evidence is given consideration. This would seem to be the command of reason as we think it is the mandate of authority."

It is perfectly evident from reading this case that it was reversed for the reason that the Court, in its instructions, failed to give the plaintiff the benefit of the law on comparative negligence. In the case at bar, there are probative facts of both, the muddy conditions, and the rough handling from which reasonable inferences of negligence could have been drawn by the jury.

We again briefly submit that beginning with the time the eight cars, loaded with gravel, were placed with set brakes upon the main line; the movement of the engine from that part of the train, the coupling up of those cars with the engine when petitioner walked in two inches of thin, sloppy mud, was a link in the chain of events that caused plaintiff's injury. The movement of those cars to the main track, far enough distant from the switch where the locomotive was to pass, in order to allow the cars to continue down the main line in which a speed of 12 miles an hour was reached at the time when the engine was uncoupled by petitioner, who thereupon climbed the ladder and crawled upon the braking platform, released the brake ratchet and crossed Harrison Street 200 feet distant from the end of the first standing car was but another chain forged in this link. The steady application of the brakes on up until the collision, the condition of the braking platform, the wet, sloppy mud on petitioner's boots and the violent collision, while the cars were moving at a speed of 6-7 miles an hour, all formed one continuous chain of circumstances resulting in plaintiff's injury.

Under the rule laid down in the *Katila* case above, as we interpret it, the trial court would have committed error had he not included in his charge to the jury all of the circumstances shown by the evidence.

On page 18 respondent gives its version of the rule laid down in *Cross* v. *Ryan,* 124 F. 2d 883, and contends that although there were several charges of negligence, it all simmered down to the single matter of a drunken brawl in a saloon. This summarization is exactly in accord with our theory that the several acts of negligence charged in the case at bar simmered down to a question of respondent's negligence in furnishing petitioner with a safe place in which to work.

On pages 19-25, inclusive, of its brief, the respondent devotes attention to the evidence in the case. This Court is thoroughly familiar with the evidence and more thoroughly with the fact that questions of fact are questions for the jury.

We contend that there was sufficient evidence of the muddy condition when connected with all the other evidence and circumstances to form a reasonable basis from which the jury could have inferred that the thin, sloppy mud on petitioner's boots augmented the hazards shown by the other evidence, made his position on the wet platform more hazardous, his footing less secure and contributed to his injury. In support of this position may we again cite *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, where the court on page 652 stated:

> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of the witnesses and arrive at a conclusion opposite from the one reached by the jury. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67-68; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353-354; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73."

On page 653 of the same case this Court said:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

We seriously contend that under the rule of law laid down by this Court with reference to the weighing of evidence in the cases of *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35, and *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, the Court of Appeals in reversing the judgment in the case at bar went afield and beyond the scope of its authority by substituting its judgment in place of that of the jury and trial judge.

We trust that respondent was more serious regarding its other contentions in its brief than its contention that, in any event the case would have to be retried or resubmitted to the Court of Appeals on the question of damages (its answer p. 25). In this respect may we call the Court's attention to the case of *Scott* v. *Baltimore & O. Ry. Co.*, 3rd Cir., 1945, 151 F. 2d 61. In this case the defendant urged that the damages were excessive. In passing upon this question, the Court said on page 64:

> "The damages were fixed by the jury and the verdict was reviewed, so far as the judge had control over the jury's action, by the District Court upon the motion for a new trial. Judicial control of the jury's verdict in this kind of case is primarily for the trial court. *Dubrock* v. *Interstate Motor Freight System*, 3 Cir., 1944, 143 F. 2d 304. A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damage is capable of much more precise ascertainment than it is in a personal injury case."

CONCLUSION.

We again request that the judgment of the United States Court of Appeals, Sixth Circuit, decided on April 5, 1949, be reversed.

Respectfully submitted,

LLOYD T. BAILEY,
MICHAEL H. LYONS,
HARRISON T. WATSON,
Counsel for Petitioner.

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In the

Supreme Court of the United States

OCTOBER TERM, 1948

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No. ~~771~~

LESTER E. BANNING,
Petitioner and Cross-Respondent,
vs.
DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner

CROSS-PETITION FOR WRIT OF CERTIORARI AND BRIEF OF RESPONDENT AND CROSS-PETITIONER IN REPLY TO THE PETITION OF LESTER E. BANNING FOR A WRIT OF CERTIORARI, AND IN SUPPORT OF CROSS-PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

CLIFFORD B. LONGLEY,
HENRY C. BOGLE,
HARALD A. JOHNSON,
Counsel for Cross-Petitioner,
1400 Buhl Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 170 East Lamed St., Detroit 26, Michigan

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In the

Supreme Court of the United States

OCTOBER TERM, 1948

No. 771

LESTER E. BANNING,
Petitioner and Cross-Respondent,
vs.
DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner

CROSS-PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Detroit, Toledo & Ironton Railroad Company, the above named respondent and cross-petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered on April 5, 1949, whereby said court refused to vacate an order of the District Court overruling cross-petitioner's motion for judgment notwithstanding the verdict of the jury in said cause.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 1254-(1) of Title 28, United States Code, as enacted by the Eightieth Congress, Second Session, 1948, effective September 1, 1948, and Rule 38-(5) of the Rules of the Supreme Court.

The judgment of the Court of Appeals was entered April 5, 1949 (R. 405).

Lester E. Banning, the plaintiff in the cause in the District Court, has heretofore filed a petition for writ of certiorari to review the same judgment and in connection therewith has filed a printed transcript of the record, to which the citations of the record hereinafter made refer.

STATEMENT OF THE MATTER INVOLVED

The District Court of the United States for the Eastern District of Michigan, Southern Division, on April 2, 1948, entered a judgment in favor of the plaintiff Banning against defendant, this cross-petitioner, in the sum of Forty-One Thousand Dollars ($41,000.00), in accordance with the verdict of the jury rendered in said cause (R. 390).

Cross-petitioner, defendant below, appealed to the United States Court of Appeals for the Sixth Circuit, claiming that the District Court erred in refusing to grant cross-petitioner's motion for judgment notwithstanding the verdict and in refusing, in the alternative, to grant its motion for a new trial predicated upon certain alleged errors committed by the trial court.

The Court of Appeals reversed the judgment of the District Court upon finding that it had committed four separate and material errors and ordered the case re-

manded to the District Court for a new trial, but refused to order judgment entered for the defendant railroad company notwithstanding the verdict.

The sole error of the Court of Appeals here complained of by cross-petitioner in its refusal to order judgment entered for cross-petitioner notwithstanding the verdict.

Two separate and distinct issues of negligence, and only two such issues, were submitted by the District Judge to the jury (R. 331) almost verbatim in the language requested by plaintiff's counsel (R. 351) as follows:

> "Plaintiff has charged in his complaint that the defendant failed to furnish him a safe place in which to work, in two respects; first, that he was directed and required to work in the yard under muddy conditions, so that his boots became slippery and covered with mud; and, second, that defendant dropped the car upon which plaintiff was riding in the performance of his duties, at such a high, dangerous and excessive rate of speed that plaintiff did not have the opportunity to bring it to a stop by means of the braking apparatus which he was required to operate before it collided with the train of parked cars standing upon the track, with brakes set, so that plaintiff was thrown therefrom to the ground and road bed, sustaining injuries complained of."

The Court of Appeals found that there was not sufficient evidence to warrant the submission to the jury of the first of these two issues, relative to directing and requiring the plaintiff to work in the yard under muddy conditions, but it held that there was sufficient evidence to warrant the submission of the issue of negligence based upon alleged excessive speed at which the box car was dropped or switched. It is cross-petitioner's contention that there was not sufficient evidence to warrant the submission of

this issue of excessive speed, and that therefore the case should have been taken from the jury and a verdict directed for defendant railroad company.

The manner in which the accident happened and in which plaintiff was injured is in general set forth in the opinion of the Court of Appeals (R. 406-409) and a portion of this statement thereof is repeated in the petition for writ of certiorari filed by plaintiff Banning (pp. 2-4). In our brief filed in connection herewith we set forth in detail the facts relating to this issue of alleged excessive speed.

QUESTION PRESENTED

The sole question presented by this cross-petition is whether there was sufficient evidence to warrant the submission of the alleged issue of excessive speed to the jury.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The United States Court of Appeals for the Sixth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.

2. The Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

3. There was not sufficient evidence to take any issue of negligence to the jury, and if the Court of Appeals had correctly decided the alleged issue relative to excessive speed, it would have directed a judgment to be entered in favor of the defendant railroad.

Wherefore, it is respectfully submitted that this cross-petition for a writ of certiorari to review the judgment of the Court of Appeals should be granted.

Dated: May 20, 1949.

CLIFFORD B. LONGLEY,
HENRY C. BOGLE,
HAROLD A. JOHNSON,
Counsel for Cross-Petitioner.

Business Address:
1400 Buhl Building,
Detroit 26, Michigan.

In the

Supreme Court of the United States

OCTOBER TERM, 1948

No. 771

LESTER E. BANNING,
Petitioner and Cross-Respondent,
vs.
DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner

BRIEF OF RESPONDENT AND CROSS-PETITIONER IN REPLY TO THE PETITION OF LESTER E. BANNING FOR A WRIT OF CERTIORARI, AND IN SUPPORT OF CROSS-PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN REPLY TO PETITION OF LESTER E. BANNING FOR WRIT OF CERTIORARI

Failure to Question Rulings of Court of Appeals is Fatal to Banning's Petition

From a reading merely of Banning's petition and the brief in support thereof, one would gather that the appeal from the District Court was based solely on the

claimed errors of the trial court in submitting each of the two issues of alleged negligence and that the Court of Appeals reversed the case and sent it back for a new trial solely on the ground that one of these issues was incorrectly submitted. Actually, in addition to the two claims of error, in respect of the submission of each of these two issues, appellant railroad company also claimed that four other separate and distinct errors were made by the District Court in the admission or rejection of testimony during the trial. Actually, the Court of Appeals found not only that the District Court committed error in submitting one of the two issues to the jury, but that it committed three separate errors in regard to the reception and rejection of testimony.

In addition to the error found by the Court of Appeals in the submission by the District Judge to the jury of the alleged negligence in directing Banning to work in the yard under muddy conditions, the other three errors which the Court of Appeals found the District Judge to have committed during the course of the trial are sufficiently shown by the following excerpts from the opinion of the Court of Appeals (R. 411-412):

> "Banning was permitted to testify, over Appellant's objection, that he had never ridden on a freight car that came into contact with another portion of the train at as high a rate of speed as the one involved in the accident. He had made some 25 or 30 flying switches previously. No foundation was laid to show the circumstances, distance, grade or other conditions of such previous operations. We believe the testimony was improperly admitted. Several factors can affect the speed at the time of impact, variable under different operations, irrespective of the initial speed given to the free rolling cars. It is a well established rule of evidence that circumstances under which other comparable con-

duct occurs, should be substantially similar. *Wigmore on Evidence,* 3rd Ed., Vol. II, Sec. 459, 460; *C. & O. Ry. Co. v. Thomason,* 70 Fed. (2) 860, C. A. 6th; *People v. Gotshall,* 123 Mich. 474, 479; *Trask v. Boston & Maine R. R.,* 219 Mass. 410, 415.

"The District Judge sustained objections to questions addressed by Appellant's counsel to the conductor and engineer asking whether in their opinion the drop switch was or was not a normal one. In each instance the indicated answer was that it was a normal one. Both witnesses had years of experience. The general rule permits a witness who is experienced in technical matters and qualified to do so, to give his opinion in a matter which is not one of common knowledge, although it involves an ultimate fact to be finally decided by the jury. *Transportation Line v. Hope,* 95 U. S. 297; *Empire Oil & Refining Co. v. Hoyt,* 112 Fed. (2) 356, 360, C. A. 6th; *Wabash Screen Door v. Black,* 126 Fed. 721, 727, C. A. 6th; *Ekblom v. G. O. Reed, Inc.,* 71 Fed. (2) 399, C. A. 5th; *Walsh v. W. P. Rend Colliers Co.,* 228 Fed. 311, C. A. 7th. Appellant's contention that the general rule is applicable in the present case, in that the proper operation of a railroad involves a combination of factors not within the knowledge of the average juryman appears to have support in the authorities. *Grand Trunk Western Ry. Co. v. Lindsay,* 201 Fed. 836, 844, C. A. 7th; affirmed, 233 U. S. 42; *Chicago G. W. Ry. Co. v. Price,* 97 Fed. 423, C. A. 8th; *Norfolk & Western Ry. Co. v. Gillespie,* 224 Fed. 316, 320, C. A. 4th; *Pittsburgh S. & N. R. Co. v. Lamphere,* 137 Fed. 20, 23, C. A. 3rd; *Union Pac. Ry. Co. v. Novak,* 61 Fed. 573, 579-580, C. A. 9th; *Bellefontaine & I. R. R. Co. v. Bailey,* 11 Ohio State 333, 335. We are of the opinion that the testimony should have been received.

"Dr. Conley's testimony should have been confined to the X-ray pictures without reference to appellee's pain, about which he had no personal knowledge."

Supreme Court Rule 38-(2) provides that "only the questions specifically brought forward by the petition for writ of certiorari will be considered." Banning has not questioned the other rulings referred to above which were made by the Court of Appeals, any one of which would necessarily result in the case having been sent back for a new trial, regardless of the court's ruling on the so-called "mud issue." There would be no point in allowing a writ of certiorari to issue for the purpose of correcting one alleged error, where other rulings made by the court below which had the same result, namely the sending of the case back for a new trial, remain uncomplained of.

A further reason for denying Banning's petition is that his complaint is merely that the Court of Appeals remanded the case for a new trial. In *Bailey v. Central Vermont Railway*, 319 U. S. 350, 63 S. Ct. 1062 (1943) three of the justices of this Court expressed the view that this Court should not undertake the review of cases under the Federal Employers' Liability Act, where no important principle of law is involved, saying "It seems to be thought, however, that any ruling which takes a case from the jury, albeit it will not serve as a precedent, is of such paramount importance as to require review here. * * * But this I do say, that this Court does not sit to redress every apparent error committed by competent and responsible courts whose judgments we are empowered to review. And, if we undertake any such task, we shall disenable the court to fulfill its high office in the scheme of our government."

Cases of this type, where the Supreme Court under its discretionary power to issue a writ of certiorari, has taken jurisdiction, are invariably those in which the decision of the court to which the writ is issued would have ended the case, had the writ not been granted. Every

case wherein a writ of certiorari was granted, as listed by Mr. Justice Douglas in the appendix to his opinion in *Wilkerson v. McCarthy*, 69 S. Ct. 413, was of this character. In the Bailey case the Supreme Court of Vermont had directed judgment to be entered for the defendant. The three members of this Court felt that even under those conditions, a writ of certiorari should not be granted. The conclusion seems inescapable that no such writ should be granted where the decision of the Court of Appeals has merely directed a new trial, and where a review of the decision by this Court would not only call upon it to determine the soundness of its ruling in respect of the submission of one issue, but would call upon it to consider numerous other rulings made by the Court of Appeals (not even mentioned by petitioner) in regard to the reception and rejection of evidence during the trial.

We submit that for the foregoing reasons, as well as those hereinafter set forth in respect of the mud issue, Banning's petition for a writ of certiorari should be denied.

The Court of Appeals Correctly Decided that the District Court Was in Error in Submitting to the Jury the Issue of the Alleged Negligence of the Railroad Company in that Banning "Was Directed and Required to Work in the Yard Under Muddy Conditions, so that His Boots Became Slippery and Covered with Mud."

Petitioner says in his brief (p. 13) that "this Court in recent cases has approved the doctrine that, if one issue or theory is properly submitted to the jury and is sustained by evidence, the general verdict should be upheld even though another issue may have been improperly submitted." This position is at variance with that taken

by counsel for Banning in the Court of Appeals, where (p. 21 of their brief filed in that court), in referring to defendant's claim that where there is more than one alleged act of negligence, an issue of negligence should not be submitted to the jury where no proof is offered of such alleged act, they state: "We have no quarrel with the rule of law laid down in these cases, but we earnestly submit that they are not in point for the simple reason that substantial evidence was introduced in the at bar, both on the question of mud, which was entirely undisputed, and on the question of the excessive rate of speed at which the flying switch was made."

The Court of Appeals followed the well-known rule that where an issue is improperly submitted to the jury because not supported by evidence, and the verdict rendered is a general one with no way to determine on which of several issues it was based, the appellant is entitled to a new trial, citing the following cases (R. 410): *Wilmington Star Mining Co. v. Fulton,* 205 U. S. 60, 77-79, 27 S. Ct. 412; *Rashaw v. Central Vermont Ry.,* 133 Fed. (2) 253, C. A. 2nd; *Roth v. Swanson,* 145 Fed. (2) 262, 269, C. A. 8th. See also *Katila v. B. & O. R. Co.,* 104 Fed. (2) 842, C. A. 6th. Other cases supporting this rule are the following: *Schilling v. Delaware & H. R. Corp.,* 114 F. 2d, 69 (CCA 2nd Circuit, 1940) and *Christian v. Boston & M. R. R.,* 109 F. 2d 103 (CCA 2nd Circuit, 1940).

In the *Rashaw* case, *supra,* the Court of Appeals, in reversing a judgment for the plaintiff under the Federal Employers' Liability Act, points out that the trial judge took occasion to state the negligence charged by the plaintiff, and that in so doing he set forth certain of the plaintiff's allegations which the plaintiff charged showed negligence on the part of the railroad. The appellate court then says:

> "This was correct so far as allegations go, but those allegations were not supported by proof sufficient to make any issue for the jury in respect to them. * * * The result is that the case was submitted to the jury upon allegations of negligence some of which were not supported by any substantial evidence whatever. This was reversible error since the verdict was general and may, for aught that now can be told, have been put upon such false issues. (Citing cases.)"

In the *Christian* case, *supra,* the Court held, in reversing a judgment under the Federal Employers' Liability Act:

> "Where two issues of negligence are sent to the jury and the verdict for the plaintiff is general, the judgment must be reversed if there was no evidence in support of one of the issues."

That this rule is especially applicable in cases under the Federal Employers' Liability Act appears from the case of *Katila v. B. & O. R. R. Co., supra.* In that case, the Court of Appeals, in an action under the Federal Employers' Liability Act, reversed a judgment in favor of plaintiff upon an appeal by the plaintiff on the ground of inadequacy of the verdict, because the lower court had *failed* to submit a certain issue, which there was evidence to support, to the jury, although it had submitted other issues. The Court pointed out that under the Federal Employers' Liability Act, the doctrine of comparative negligence had been introduced, and that the jury is permitted to reduce damages in the proportion that the plaintiff's negligence, if any, bears to the total negligence, and that:

> "* * * there may not be adequate assay of total negligence unless all negligence supported by evidence is given consideration. This would seem to

> be the command of reason as we think it is the mandate of authority." (Citing cases.)

The Court went on to say that:

> "The verdict was general and it is impossible, of course, to say in what amount damages were found or by what sum they were reduced because of negligence of the plaintiff."

In the present case, the Court duly submitted to the jury, as requested, instructions which would permit the jury to reduce any damages otherwise found in proportion to the negligence, if any, attributable to the plaintiff (R. 337).

If the claimed issue respecting the mud was improperly submitted to the jury, then, under the reasoning of the Katila case, there could not be an adequate assay of the total negligence of both parties to permit the proper apportionment as between them. But, of course ,the vice of the instruction really goes far beyond this, because, the verdict being general, we have no means of knowing what part of the verdict represents damages on account of the alleged, but unproven, negligence of the defendant in respect of the mud, nor, indeed, do we have any means of knowing that the entire verdict is not attributable to the determination of this alleged issue in favor of the plaintiff.

Nor was this alleged issue inadvertently or casually injected into the case. Let it be remembered that plaintiff specifically charged in his complaint that the defendant was negligent "in causing and directing plaintiff to assist in the switching of cars which necessitated him to alternately walk and work about on the ground when it was deep with slippery, greasy mud" (R. 3); that plaintiff specifically requested the court to submit as an issue of

negligence to the jury that plaintiff "was directed and required to work in the yard under muddy conditions so that his boots became slippery and covered with mud" (R. 351); that defendant specifically requested that this issue be eliminated (R. 357); that the lower court nevertheless gave this request almost verbatim as asked by plaintiff (R. 331); and that defendant made timely objetcion under Rule 51 to this part of the court's charge and its failure to eliminate this issue (R. 346-348).

In plaintiff's opening statement (R. 17-18), his counsel said:

> "* * * it had been raining quite constantly all afternoon, and perhaps longer than that, and that in and about the place where the plaintiff, Mr. Banning, was required to work because of the nature of his duties, the road bed on some of these tracks, that is, the road bed surrounding them and immediately adjacent where the plaintiff had to go, had become extremely muddy, wet and slippery, and as a result of which the plaintiff's boots and his feet and his shoes became and were in a damp and muddy condition, but that there was nothing he could do about it, because he had to keep on working in and around those conditions; and that those conditions by or surrounding the railroad's property there were dangerous conditions; that the danger of those conditions were known to the plaintiff—or the defendant railroad company, rather."

Defendant's counsel here objected to the claim that these conditions were alleged to be dangerous, and counsel thereupon pointed to paragraph 3 of the complaint which alleged that the defendant was negligent "in failing to furnish plaintiff a reasonably safe place in which to perform his duties as an employee."

In plaintiff's argument to the jury just before the submission of the case to it (R. 296-297), plaintiff's counsel said, among other things:

> "We based our charge of negligence on the fact that he wasn't furnished a safe place in which to work. That is a common ground consisting of two divisions. One is that they compelled him to work on grounds that were muddy on a rainy night. The mud was three or four inches deep. He got mud on his boots. That evidence is not disputed. Any evidence in this case that hasn't been disputed, you have got to take as a fact. It has not been disputed that he did work in mud three or four inches deep, sloppy mud, and that it was over his boots, and that fact contributed to his accident because his feet were slippery and when the jolt came he did not have as good a foothold as he might have had if the platform were dry, if it weren't a rainy night and if mud hadn't been on his boots. The other premise is that he was jarred off because it was an unusual jolt."

Not only did the court, over defendant's objection, send this specific issue to the jury, but throughout his instructions he emphasized the matter by repeatedly referring to the duty of defendant railroad to furnish plaintiff with a reasonably safe place in which to work (see, for example, the court's charge at pages 332, 333, 337, 338). Inasmuch as "safe place in which to work" has no application, so far as this case is concerned, to any contention other than the alleged mud on the side track, and obviously could not refer to the manner in which cars or equipment were operated by fellow employees, the court should not have used this phrase at all in its charge.

Nor do the cases cited by petitioner on pages 13-17 of his brief sustain the claim made by him that the rule of the above cited cases has been abrogated. In *Bigelow v.*

R.K.O. Radio Pictures, 327 U. S. 251, 66 S. Ct. 574, according to the opinion of the Supreme Court, the sole question for decision was whether the evidence of damage was sufficient to support the verdict. There is no indication that defendant was complaining that an issue unsupported by evidence had been submitted. The case provides no parallel to the present one.

Similarly, in *Larsen v. Chicago & N. W. Ry. Co.,* 171 F. 2d 841, defendant does not appear to have been complaining merely of the submission of an unsupported issue, but its contention was that the court erred in denying its motion for judgment notwithstanding the verdict. The case has no application.

Again, in *Miller v. Advance Transportation Company,* 126 F. 2d 442, defendant was complaining of the court's refusal to instruct the jury to return a verdict for the defendant and of the overruling of defendant's motion for judgment notwithstanding the verdict. Naturally, such claim could not be sustained if there was sufficient evidence on *any* charge of negligence.

The case of *Tiller v. Atlantic Coast Line Ry. Co.,* 323 U. S. 574, 65 S. Ct. 421 (cited by petitioner as giving tacit approval to the doctrine for which he now contends) actually tends to establish the contrary. The Supreme Court reaffirmed its previous holding that the evidence justified submission to the jury of the issues raised by the original allegations of negligence, sustaining the Court of Appeals on this point. The Court of Appeals, however, had held that there was no evidence on the other issue involving alleged violation of the Boiler Inspection Act, and had found that the District Court should therefore have directed that this issue be found in favor of the railroad. The Supreme Court discusses this question at considerable length and comes to the

conclusion that under the evidence in that case, that issue was properly submitted to the jury. If this is a tacit approval of anything at all, it is tacit approval of the rule for which we are contending, otherwise the Supreme Court would merely have found that, as it agreed with the Court of Appeals that there was evidence to support the first issue, it would be unnecessary to discuss the second.

In *Cross v. Ryan,* 124 F. 2d 883, an action for damages under the Dram Shop Act of Illinois, the questions raised by the defendant were that each count of the complaint should have been dismissed, that a verdict should have been directed, and that a new trial should have been granted on the ground of insufficiency of the evidence to support the causes of action stated in the complaint. The court held that each count stated a cause of action under the Illinois statute, and that there was substantial evidence to support the verdict. The facts in the case related only to the single matter of a drunken brawl in a saloon. The various counts were merely alternative methods of stating the liability of the proprietor for selling intoxicating liquor, and it is perfectly clear from a reading of the opinion that there was substantial evidence to support each and every count. The defendant apparently only raised the question of the sufficiency of the evidence to support the causes of action stated in a motion for a new trial, and there is no indication that he objected to the submission of any particular issue of negligence on the ground of insufficiency of evidence relating to that issue alone. In fact, notwithstanding the several different ways in which plaintiff stated his cause of action, it is clear that there was only one real issue of negligence involved, namely, the furnishing of the liquor.

Petitioner (pp. 15-17 of his brief) next makes the claim that there was substantial evidence to support the issue of negligence in respect of the alleged muddy condition of the road bed.

In support of our claim that there was no evidence sufficient to take this issue to the jury, we refer, first, to the opinion of the Court of Appeals pointing out that it is not negligence on the part of a railroad to operate merely because of a rainy day; that plaintiff had ample opportunity to clean any mud off his boots; and that what little mud he got on his boots was in an entirely different location from where the accident happened; and that the two incidents were entirely separate and distinct (R. 409-410).

On this record the following statements are not subject to dispute:

(a) Plaintiff himself, who was equipped with new boots, makes the sole claim that he had to walk in some thin mud, about two inches deep, while conducting the coupling operation of the switch engine to the two box cars on the distillery "barrel track," which was on the other side of the distillery from the place where the accident happened (R. 34, 53).

(b) That is the only place where he claims the roadbed was muddy, and he emphasized this by stating (R. 34), "That is where the roadbed was muddy."

(c) After this coupling was completed, the Diesel engine remained at that point for about five minutes and plaintiff spent three or four minutes on the rear end of the engine, where he was in a position where he could have talked to either the fireman or engineer. He remained there while the engine

proceeded north along the barrel track some 400 yards or more to where the gondola cars were standing on the quarry track (R. 35, 72-73).

(d) When plaintiff dismounted from the engine to make the coupling to the gondola cars on the quarry track, he testified that the roadbed there was "gravel and cinders, solid roadbed" and that there was no mud there (R. 36).

(e) He then stood on the metal step or "stirrup" on one of the box cars while the train proceeded along the quarry track into the main track to a point on the east side of the distillery, a distance of approximately 500 yards. He got off at this point to confer wtih the conductor, but he does not say there was any muddy condition whatsoever at that point.

(f) Plaintiff then got back on the stirrup on the box car nearest the engine and rode in that position, and so far as the evidence shows did not get off on the ground again until the accident took place some time later. In that position he rode southward as the Diesel engine pushed the two box cars approximately 300 yards before it reversed itself to make the drop switch. (The approximate distances referred to are taken from the scale drawing, Df. Ex. 4.)

(g) If plaintiff acquired some mud on his boots back on the barrel track, it is quite plain that he had every opportunity to remove it prior to the happening of the accident. He could readily have done this while the switch engine remained on the back track, or while he was riding on the engine near the engineer and the fireman, or while he was

riding on the stirrup which obviously would have constituted a perfect mud scraper (see Pl. Ex. 1).

(h) There is absolutely no evidence in the record that he at any time advised any member of the crew or anyone else that his boots had become muddy or that he asked for any opportunity to clean them off. (Although it will be noted that in his complaint he originally charged negligence in failing to give him time and opportunity in which to clean the mud from his boots (4), this claim was clearly abandoned in his own requests to charge.)

(i) An extraordinary feature in regard to this claimed issue is that, according to plaintiff's own version of the manner in which the accident happened, the mud on his boots, if any, had absolutely nothing to do with it. The only time that the plaintiff ever mentions the mud, after referring to the mud that he claims was adjacent to the barrel track on the other side of the plant, was when his own counsel interrogated him as follows (R. 53):

> "Q. At the time you performed that operation following picking up the cars over on the distillery track, were your boots muddy?
>
> A. Yes, they were muddy. They were bound to have been muddy. There were mud that we had been wading in, walking in, in the back track where we had picked these two cars up.
>
> Q. All right, sir. But, nonetheless, you did get up the ladder and on that brake platform?
>
> A. Yes, sir."

(Note in the above that plaintiff again refers only to mud found in the "back track," which is the same as the "barrel track" marked on Df. Ex. 4.)

Plaintiff does not claim that any mud on his boots had anything to do with his activities in and about braking of the box cars, but, on the contrary, repeatedly states that he was thrown from the braking platform as a result of the impact of the cars, while his feet were firmly planted on the brake platform and his hands had a firm grip on the brake wheel. Following are excerpts from his testimony:

> When he mounted to the brake platform, he took a position facing the car "with my feet firmly on the brake platform" (R. 53).
>
> At the time of the impact, "I was standing on the platform, the brake platform, with a firm foothold and both hands on the brake wheel" (R. 58).
>
> "When the two cars came together I was there holding on the brake wheel with a strong grip and as they came together there was a large crash and I felt myself going through the air and I landed on this end gravel car with my head and shoulders" (R. 61).
>
> In answer to questions by the Court, he stated that his hands were gripping the brake wheel, including his left hand which also held the lantern, that his feet "were firmly on the brake platform" and that "after my hands and feet were jerked loose, I knew I was falling but there was nothing to grab there after I was jerked loose" (R. 95-96).

Nowhere in his account of the accident did plaintiff intimate in any way that his feet were caused to slip from the brake platform due to any mud on his boots, or, in fact, that they were caused to slip at all, and his repeated statements to the effect that he was violently thrown from the brake platform while his feet were firmly planted and his hands were firmly gripping the brake wheel are wholly inconsistent with any such theory.

Even if a causal connection had been shown between the acquisition by the plaintiff of mud on his boots and the accident, it could hardly be said that defendant railroad was guilty of negligence in this respect. Railroads are operated at night, as well as in the daytime. They are operated in all kinds of weather. That a railroad is not responsible for weather conditions or for ordinary accumulations of mud and water would scarcely seem to require a citation of authority. To say that a railroad must so construct or ballast every portion, not only of its own roadbed and yards, but of every side and spur track situated on the property of private industries (which was the case here) so as to prevent ordinary accumulations of mud resulting from normal climatic conditions from time to time would impose a duty not only extraordinary bu impossible to carry out.

Even where snow or ice accumulates on steps or running boards, a railroad is not bound to anticipate that the employee will fail to exercise due care in using available means to remove same: *McGivern v. Northern Pac. Ry. Co.*, 132 Fed. 2d 213 (C. C. A. 8th Circuit, 1942); *Missouri Pac. R. Co. v. Aeby*, 275 U. S. 426, 48 S. Ct. 177 (1928). See also: *N. Y. C. & St. L. R. Co. v. Boulden*, 63 Fed. 2d 917; *International Cotton Mills Co. v. Pernod*, 244 Fed. 723 (C. C. A. 1st Circuit, 1916); *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 S. Ct. 835.

In the present case the accumulation of mud, if any, on plaintiff's boots was under his sole control and he had every opportunity to remove same, if he considered it necessary or advisable. Plaintiff abandoned the claim made in his complaint that he was not given such opportunity because the facts obviously refute any such claim.

When, however, it also appears that plaintiff has not only failed to produce any evidence that the mud condition contributed in any way to the accident, but, in fact, by his own story, has definitely established the contrary, to engage in further argument would seem to be an unnecessary laboring of the point. There is no evidence in this entire record on which the jury could have properly found that this alleged mud condition had anything to do with the accident, and therefore the issue was improperly submitted to it.

There are undoubtedly cases where the acts contributing to an accident or injury are such that it would be impractical or improper to attempt to segregate them because they are all part of one pattern. Such a case was *Union Pac. R. Co. v. Hadley,* 246 U. S. 330, 38 S. Ct. 318. In that case the several acts of the various employees involved, including the train dispatcher, the conductor, and the deceased himself were so interwoven that it was impossible to say, under the conditions then existing, that they did not each of them contribute to the deceased's injuries. Similarly, in *Blair v. B. & O. R. Co.,* 323 U. S. 600, 65 S. Ct. 545, there were various interwoven circumstances forming what the court called a "single pattern." Actually, in the Blair case the court was not passing upon the specific question here involved, because it does not appear that the defendant was complaining of anything except that there was not sufficient evidence to warrant the verdict at all.

In the present case, the court left the issues to the jury in such manner that we are unable to say that the jury did not base its decision in part, or even wholly, upon the alleged negligence of the railroad in directing and requiring plaintiff to work in the yard under muddy conditions, and this notwithstanding that the only evidence

shows what little mud plaintiff got on his boots was some time before the accident, during which time he had plenty of opportunity to clean his boots, and notwithstanding that plaintiff's own evidence affirmatively shows that the mud had nothing whatever to do with the accident.

Conclusion

It should, perhaps, be pointed out that defendant railroad company made the additional claim upon its appeal to the Court of Appeals that the verdict of the jury was grossly excessive, and that the trial court had abused its discretion in refusing to grant a new trial upon that ground. As the Court of Appeals did not find it necessary to pass upon this question, we are unable to say what its views in that respect are. It would seem, however, that if Banning's petition for a writ of certiorari should be allowed, and if the Court of Appeals should be found in error in respect of all the rulings actually made by it, it would be necessary in such case that the cause be remanded to the Court of Appeals for a determination of that question, the allowance of which in favor of defendant railroad would likewise presumably result in the granting of a new trial. We mention this simply to preserve the point in the event of the allowance of Banning's petition. Respondent respectfully submits that for the reasons above set forth, the petition of Lester E. Banning for a writ of certiorari should be denied.

CLIFFORD B. LONGLEY,
HENRY C. BOGLE,
HAROLD A. JOHNSON,
Counsel for Cross-Petitioner.

CROSS-PETITIONER'S BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

Opinion of the Court Below

Opinion of the United States Court of Appeals, Sixth Circuit, filed April 5, 1949, is found on pages 406-412 of the record.

Basis of Jurisdiction

Jurisdiction is invoked under Section 1254-(1) of Title 28 United States Code, as enacted by the Eightieth Congress, Second Session, 1948, effective September 1, 1948, and Rule 38-(5) of the Rules of the Supreme Court.

Statement of the Case

Two and only two issues of negligence were submitted to the jury as follows (R. 331):

> "Plaintiff has charged in his complaint that the defendant failed to furnish him a safe place in which to work, in two respects; first, that he was directed and required to work in the yard under muddy conditions, so that his boots became slippery and covered with mud; and, second, that defendant dropped the car upon which plaintiff was riding in the performance of his duties, at such a high, dangerous and excessive rate of speed that plaintiff did not have the opportunity to bring it to a stop by means of the braking apparatus which he was required to operate before it collided with the train of parked cars standing upon the track, with brakes set, so that plaintiff was thrown therefrom to the ground and road bed, sustaining injuries complained of."

Cross-petitioner, defendant below, moved for a directed verdict (R. 290-291); it requested specific instructions to eliminate each of these issues of negligence (R. 357); it made timely objection under Rule 51 both to the submission of these issues and to the court's failure to grant defendant's several requests to eliminate same (R. 346-348); and it made a motion for judgment notwithstanding the verdict, and for a new trial in the alternative (R. 364-382). The District Court denied both the motion for judgment notwithstanding the verdict and the motion for new trial and entered a judgment on the verdict of the jury in favor of plaintiff (R. 389-391). The Court of Appeals sustained the District Court in denying the motion for judgment notwithstanding the verdict, but granted a new trial, finding that the District Court committed four separate errors, namely, that it improperly submitted the so-called "mud issue" and that it committed errors in the reception and rejection of certain testimony (R. 405-412).

It is the claim of cross-petitioner that its motion for judgment notwithstanding the verdict should have been granted and judgment entered for the defendant railroad; and inasmuch as the Court of Appeals has found that one of the two issues was improperly submitted, the sole question on this cross-petition is whether there is sufficient evidence to warrant the submission of the other alleged issue, namely, that pertaining to the alleged excessive speed at which the box cars on which plaintiff Banning was riding were switched or "dropped."

Plaintiff charged in its declaration that "defendant's agents and servants carelessly and negligently pushed and kicked said box car to be so switched in and upon said track with such violence that plaintiff could not control and stop the same in time to prevent a violent collision with said standing cars on said switch, causing plain-

tiff to be dislodged from his position on said car and to be thrown therefrom and injured as aforesaid" (R. 3).

The Court of Appeals has pointed out in its opinion how the drop switch was made (R. 407). A more detailed statement is as follows:

The gondola cars were left on the main track with their brakes set, the southerly end of this string being not less than 200 feet north of Harrison Avenue (R. 231, 266).

The Diesel engine then continued backing southward along the main track, pushing the two box cars ahead of it, across Harrison Avenue, past the switch leading into the distillery track (this point being marked "Point of switch—distillery track" on Df. Ex. 4), to a point estimated by plaintiff to be about 300 feet south of that switch (R. 37, 38, 41). During this movement, plaintiff was standing on the metal step or so-called stirrup, near the end of the box car which was next to the Diesel engine. Exhibit 1 is a photograph taken by defendant of this particular box car MEC 5256. It shows the brake at the end of the box car, the platform below the brake, on which the brakeman could stand while operating the brake, and two ladders at the corner of the box car, one on the end of the box car immediately adjacent to the platform and brake, and the other on the side of the box car next to the end, permitting the brakeman to swing from the side ladder to the end ladder and thence to the braking platform. Projecting below the seven main rungs of the side ladder is the metal step on which plaintiff stood at this time, in a position which would enable him to pull the coupling pin by means of a lever which appears below the end ladder (R. 49-50).

The switching crew was now in a position to make a so-called "drop switch" or "flying switch" whereby the

Diesel engine would be directed along the side track or so-called "distillery track" and the two box cars would be directed north along the main track, to be coupled onto the gondola cars standing several hundred feet north of Harrison Avenue (R. 48).

Plaintiff was thoroughly familiar with this type of switching, and had performed similar operations on defendant railroad some twenty-five or thirty times previously (R. 59, 74-75).

This maneuver was actually carried out in the following manner: The other brakeman, Smalley, was stationed in the middle of Harrison between the main track and the distillery track, to protect traffic (R. 40, 238). The conductor, Toombs, stood on the east side of the main track, at the point marked on Defendant's Exhibit 4 "Point of switch—distillery track," for the purpose of throwing that switch by means of the hand lever (R. 49, 216). Toombs gave the engineer the signal, and the Diesel engine started rolling northward toward the distillery track switch, at a speed fast enough to get the cars rolling, which speed was estimated at about twelve to fourteen miles per hour as it approached the switch; whereupon Toombs gave the engineer the signal to slack off so the cars could be uncoupled. This uncoupling was accomplished by plaintiff pulling out the coupling pin by means of a lever as he stood on the metal step referred to above, while holding on to a rung of the ladder with his left hand in which he also held the electric battery lantern (Pl. Ex. 3). The engine then speeded up slightly and passed down into the distillery track, Toombs immediately threw back the switch or "relined" it, and the two box cars proceeded under their own momentum northward on the main track toward Harrison Avenue (R. 48-51, 216-217, 248-249, 264).

After the two box cars, with the brakeman riding the front or northerly end of the first of these cars, passed the distillery switch and proceeded northerly toward Harrison Avenue, the Diesel engine returned back over the distillery track onto the main line, and Toombs "relined" the distillery track switch to permit the engine to proceed northerly over the main track in the same direction as the two box cars had moved. Toombs then walked diagnoally across the main track and the distillery track to the Derail (so designated on Df. Ex. 4) on the west side of the distillery track, he locked this Derail (which had been opened to permit the switch engine to come down the side track), then crossed back to the east side of the main track, signaled the engineer to come ahead, and got on the side step of the Diesel as it passed him (R. 217, 226, 250-251).

It was about eight o'clock in the evening, there was a "misting" or light rain at the time, and, although night had fallen, there was apparently enough visibility to enable plaintiff to see for some distance, as he testified that as the box cars approached Harrison Avenue, he saw the other brakeman standing there, where the blinker lights were working at the crossing, and that as he was nearing the crossing he turned his head and took an observation of the gondola cars which stood several hundred feet north of Harrison Avenue (R. 56-57).

(The above facts are undisputed. While defendant introduced testimony as to other facts, including testimony of several witnesses, as to admission by plaintiff that the accident happened in an entirely different manner from that which plaintiff claimed on the trial, we of course, for the purpose of the motion for directed verdict, accept plaintiff's version as true, and accordingly the following facts, being plaintiff's own version, are accepted as true.)

Plaintiff's version is as follows (R. 52-61): After uncoupling the box cars from the engine, plaintiff climbed the side ladder near the end of the box car to about the fifth round, then "switched around to the end ladder" and "stepped over to the brake platform" and took his position there facing the car "with my feet firmly on the brake platform." He continued holding the lantern while he took hold of the brake wheel, but there was nothing about holding it that interfered with the operation of his hands (R. 54). He made sure that the cam, which engages the ratchet to hold the brake wheel as it is applied, was in the proper position and started to apply the brakes. He testified that by the time he started to apply the brakes he was "nearing the road crossing, Harrison Avenue" (R. 55). It was at this time that he took an observation of the gondola cars by turning his head and looking over his shoulder. The blinker lights were working at the crossing and the other brakeman was standing there (R. 56). Based on his experience in driving automobiles and his observation of the speed of railroad equipment, plaintiff testified that, in his opinion, at the time he made his observation just before entering Harrison Avenue, the speed of the box cars was "around 10 or 11 miles an hour," having decreased somewhat from the time they were uncoupled (R. 57). From this point he estimated it was still some 350 or 400 feet to the first of the gondola cars (57). He testified that the box car on which he was riding came in contact with the gravel train (that is, the gondola cars) while he "was standing on the platform, the brake platform, with a firm foothold and both hands on the brake wheel," that he was then putting on the brakes to slow the car down to where he could get it stopped before it hit the other cars, although it was not his intention to bring it to a dead stop until it contacted those cars, so it would couple to them. He estimated that the speed of

the box cars at the time of the impact was "around 6 or 7 miles an hour," that he kept applying the brake by turning the wheel and observing the end of the car that he was coming into, but was unable to bring it to a lower speed.

He testified that from the time he started applying the brakes before entering Harrison Avenue, up to the point of the impact, he made constant application of the brakes (R. 58, 68); that there was "an awful crash when it hit" (58); that he was then holding on to the brake wheel with a strong grip, but as the cars came together, "I felt myself going through the air and I landed on this end gravel car with my head and shoulders," then fell off on the roadbed on his back (R. 61).

The Court of Appeals Erred in Deciding That the District Court Was Correct in Submitting to the Jury the Issue of Alleged Excessive Speed.

The evidence of excessive speed is insufficient to warrant submission to the jury. The point at which plaintiff pulled the pin to cut the two box cars off from the switch engine when the drop was made must be assumed to have been at least one car-length south of the "Point of switch —distillery track" (See Df. Ex. 4). This would mean that this point was about 417 feet south of the south line of Harrison Avenue (393 feet to "Point of switch— distillery track"—Df. Ex. 4; plus at least 40 feet for the length of a box car—see R. 279; minus 16 feet for one-half the width of Harrison). In other words, according to plaintiff's own testimony, the distance from the point where he uncoupled the pin at the beginning of the switching movement until he started applying the brakes was about 417 feet. Taking the highest speed, as claimed by him, at which the cars started on this movement, namely

14 miles an hour, and the speed at which he claimed they were going as they entered Harrison Avenue, namely, 11 miles per hour, we have an average speed over this dis tance of 12½ miles per hour. This means that the box car on which plaintiff was riding took something over 22 seconds to cover the distance just referred to.

The distance from the south side of Harrison Avenue to the first of the gondola cars north of Harrison was, according to plaintiff's testimony, at least 300 feet (R. 37, 49). Defendant's witnesses, however, pointed to a spot on defendant's Exhibit 4 indicating that the first of these gondola cars was from 200 to 230 feet north of the north edge of Harrison Avenue (R. 231, 266). Taking the shortest distance testified to as being the most favorable to plaintiff, that is, 200 feet, and adding 33 feet for the width of Harrison Avenue, we find that from the time plaintiff claims to have started applying the brake to the point of impact, the box cars had at least 233 feet to go. As he testified they were going not over 11 miles an hour at Harrison and not more than 7 miles at the point of impact with the gondola, this gives an average speed of 9 miles per hour for such distance of 233 feet. At such speed, it would take the box cars more than 17 seconds to cover the latter distance. A calculation for the entire distance from the point of pulling the coupling to the point of impact with the gondolas shows, according to plaintiff's own testimony, that it took the box cars upwards of 40 seconds to cover this entire distance.

Although to the eyes the track appeared to be substantially level, actually the cars were going up a slight grade as they approached Harrison Avenue, but after arriving at Harrison Avenue until they coupled with the gondola cars, they were proceeding on an absolutely level grade (R. 176).

Assuming that plaintiff is giving the correct version of the facts when he testifies that he was thrown from the brake platform on account of the heavy impact when the box cars coupled onto the gondolas, there is still nothing in his testimony that raises any inference of negligence on the part of the railroad for the jury to pass upon. He does not claim that there was any difficulty in climbing the side ladder, crossing over to the end ladder, then stepping on to the brake platform. So far as the evidence shows, the time it took him to check on the cam to see that it was in proper position was negligible. He states that he started to apply the brakes as he was nearing Harrison Avenue. He took an observation over his shoulder of the position of the gondola cars, with which he must already have been familiar. At this point, at least 20 seconds had elapsed from the time he started up the ladder. There is no explanation why he did not apply the brakes earlier if he felt it was necessary. The answer must be that, as a matter of judgment he applied the brakes when and to the extent that he felt to be necessary. He still had over 200 feet to go. It was a matter within his own judgment and discretion at what speed to permit the box cars to couple onto the gondolas. He testified it was not his purpose to stop short, but to permit an automatic coupling. At no time either in the pleadings or in the evidence has it been claimed that the brakes, or any other equipment, were in any manner defective. According to his own testimony, the box cars were slowed down from a speed of 10 to 11 miles at the crossing to about 6 or 7 miles an hour at the time of contact with the gondolas. He says he was unable to bring it to a lower speed, but there is nothing in the evidence to indicate in any way that this was due to any negligence on the part of the railroad or any of its employees other than plaintiff himself. His story is perfectly consistent with the

failure on his own part either to apply sufficient pressure to the brake when he had plenty of opportunity to do so or with his own failure of judgment. It is consistent with the assumption that he may have waited too long or that he may not have used enough force in applying the brakes.

The claim made by plaintiff on this point is that the box car was dropped "at such a high, dangerous and excessive rate of speed that plaintiff did not have the opportunity to bring it to a stop by means of the braking apparatus which he was required to operate before it collided with the train of parked cars" (R. 3, 331, 351). We submit that the record is devoid of any legal proof that this is true. Plaintiff's and defendant's testimony is substantially in accord as to the speed of the box cars at the time of the drop, plaintiff testifying that it was about 12 to 14 miles per hour, and defendant's fireman testifying it was about 12 miles per hour. There is no evidence in this case that under the conditions here existing, this was an improper or excessive rate of speed at which to start this operation. Nor is there any evidence that the box cars could not have been properly controlled during the time and distance involved. It is true that the Court permitted the plaintiff to testify, over defendant's objection (R. 59-60), that he had never ridden on freight cars that came into contact with another portion of the train at as high a rate of speed as that which he described here, and that he had never ridden on a car "that had been connected in or shoved in at that rate of speed."

The Court of Appeals, however, sustained defendant's claim that this testimony was improperly permitted for the reason that no foundation was laid to show that the circumstances, distance, grade, or other conditions of some 25 or 30 flying switches that plaintiff had testified he had

previously made were similar to the present switching operation, and obviously, the plaintiff's statement has no evidential value whatsoever in proving or tending to prove that this rate was other than normal or proper under the conditions here involved. The 25 or 30 flying switches that plaintiff had engaged in (R. 59) were made at other places up and down the defendant railroad, some of them in Ohio, and none of them at the point involved here (74). For all we know, they may have been downgrade or involved very short distances. There is no evidence in this record either that the rate of speed on this occasion was improper or even that the box cars, under their own momentum and without any braking whatever, would have continued on down to connect to the gondola cars had they been started out at a less speed.

Plaintiff has not made out a case for the jury under the Federal Employers' Liability Act until he has affirmatively shown that defendant has been negligent, that is, that it has failed to exercise reasonable or ordinary care in view of all the circumstances, and that such failure was in whole or in part the proximate cause of the injury: *McGivern v. Northern Pac. Ry. Co.*, 132 Fed. 2d 213, at 217; *Murphy v. Lehigh Valley R. Co.*, 158 Fed. 2d 481 (CCA Second Circuit, 1946); *Fantini v. Reading Co.*, 147 Fed. 2d 543 (CCA Third Circuit, 1945); cert. den. 325 U. S. 856, 65 S. Ct. 1185; *Edwards v. B. & O. R. Co.*, 131 Fed. 2d 366 (CCA Seventh Circuit, 1942); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409; *Barry v. Reading Co.*, 147 Fed. 2d 129 (CCA Third Circuit, 1944), cert. den. 65 S. Ct. 912, 1022.

The weight of the evidence under the Federal Employers' Liability Act must be more than a scintilla before the case may be properly left to the jury: *Brady v. Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232 (1943).

To justify submitting the plaintiff's case to a jury, the evidence in his favor must be substantial and this means more than a mere scintilla; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion: *Mutual Benefit H. & A. Assn. v. Snyder,* 109 Fed. 2d 469 (CCA Sixth Circuit, 1940); *Roth v. Swanson,* 145 Fed. 2d 262 (CCA Eighth Circuit, 1944); *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S. 197, 229; 59 S. Ct. 206, 217.

A verdict should be directed for defendant when the evidence produced by plaintiff is such that the jury could not properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed, or where the court in exercise of sound judicial discretion should set aside such verdict if rendered: *Gunning v. Cooley,* 281 U. S. 90, 50 S. Ct. 231 (1930); *Mutual Benefit H. & A. Assn. v. Snyder,* 109 Fed. 2d 469 (CCA Sixth Circuit, 1940); *Strider v. Penn. R. Co.,* 60 Fed. 2d 237 (CCA Sixth Circuit, 1932).

The case should not be permitted to go to the jury when any verdict in favor of plaintiff must necessarily be based upon mere speculation or conjecture: *Atchison, T. & S. F. Ry. Co. v. Toops,* 281 U. S. 351, 50 S. Ct. 281 (1930); *Penn. R. Co. v. Chamberlain,* 288 U. S. 333, 53 S. Ct. 391 (1933).

In *Cunningham v. Great N. R. Co.,* 73 N. D. 315, 14 N. W. 2d 753 (1944), a case under the Federal Employers' Liability Act, the Court set aside the verdict and ordered judgment entered for the defendant on the ground that "the state of the evidence is such that fair-minded men in the exercise of reason and judgment could not have reached the conclusion that the person whom the jury by its verdict found to have been negligent in fact had been

negligent." And see *Eckenrode v. Pennsylvania R. Co.* 69 S. Ct. 91.

We submit that the evidence in this case is such that fair-minded men in the exercise of reason and judgment could not have reached the conclusion that defendant was negligent or that any of its acts were the proximate cause of the injury to plaintiff.

While the jurors may refer to their general knowledge upon matters notorious and unquestioned (IX *Wigmore on Evidence* (Third Edition), Sec. 2570), neither they nor the court can take judicial notice of the length of time in which a train can be stopped under a given set of facts; such testimony can only be supplied by experts or other witnesses who have had experience in the stopping of trains: *Keppler v. N. Y. Cent. R. Co.*, 263 App. Div. 199 (N. Y. 1942)—a case under the Federal Employers' Liability Act.

In the present case, to find that defendant shoved in the cars at an excessive rate of speed, the jury had nothing before them but statements of the plaintiff which, as we have pointed out above, are entirely consistent with the exercise of care by defendant and, indeed, with the assumption that plaintiff himself merely failed to act when he should have acted or had a lapse of judgment.

The Court of Appeals in its opinion states: "There was a conflict in the evidence as to the speed at which the switching operation was performed." As applied to the only point at which the rate of speed as bearing on defendant's negligence would be pertinent, namely, the point at which the two box cars were uncoupled from the switching engine before the latter went down into the side track, this statement of the Court of Appeals does not appear to conform to the record. There was no con-

flict in the testimony as to the speed at which the box cars were going when they were cut loose from the switch engine. Plaintiff Banning testified that the Diesel engine just prior to the uncoupling was going at a speed fast enough to get the cars going, which speed was estimated by him to be 12 to 14 miles per hour as it approached the switch (R. 57), and defendant's witness Hitchingham, the fireman, testified that at that time the speed was about 12 miles per hour (R. 264). Both men testified that the engine slowed down to create slack (R. 80, 264), which would doubtless slow down the box cars somewhat. The only conflict in the testimony as to speed is that between the testimony of Banning that the box cars were going 10 or 11 miles per hour as they crossed Harrison Avenue, and the testimony of the brakeman, who was standing at Harrison Avenue, who estimated their speed at that time at 3 or 4 miles per hour. For our purpose here, we accept Banning's testimony as to this speed.

The question is this: Was any evidence introduced in this case from which the jury would have the right to find that the speed of 12 to 14 miles per hour at which the switching crew cut loose the box cars from the engine was excessive under the conditions relative to grade, distances involved, etc. Banning himself was in control of the box cars from that point on. We submit that there is nothing to show that that speed was excessive under these conditions, and that Banning's testimony is entirely consistent with failure of judgment or negligence on his own part and does not show negligence on the part of other employees of the railroad.

Conclusion

Cross-petitioner respectfully requests, for the reasons stated, that a writ of certiorari issue out of this court to review the decision of the United States Court of Appeals for the Sixth Circuit in respect of the matter referred to.

CLIFFORD B. LONGLEY,
HENRY C. BOGLE,
HAROLD A. JOHNSON,
Counsel for Cross-Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. [redacted]393

LESTER E. BANNING,
Petitioner and Cross-Respondent,
vs.
DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner

CROSS-PETITIONER'S REPLY TO CROSS-RESPONDENT'S ANSWER TO CROSS-PETITION FOR WRIT OF CERTIORARI; AND SUPPLEMENTAL BRIEF

CLIFFORD B. LONGLEY,
HENRY C. BOGLE,
HAROLD A. JOHNSON,
Counsel for Cross-Petitioner,
1400 Buhl Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 170 East Lernard St., Detroit 26, Michigan

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 771

LESTER E. BANNING,
Petitioner and Cross-Respondent,
vs.
DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner

CROSS-PETITIONER'S REPLY TO CROSS-RESPONDENT'S ANSWER TO CROSS-PETITION FOR WRIT OF CERTIORARI; AND SUPPLEMENTAL BRIEF

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Cross-respondent (page 7 of his answer to the cross-petition) cites the trial court's memorandum in support of his claim that the evidence was sufficient to warrant the submission of the alleged issue of excessive speed to

the jury. We have already covered in detail our reasons for claiming that such issue should not have been submitted (cross-petitioner's brief, pp. 32-39). It will be noted that the trial court refers to plaintiff's testimony "that the speed of the two dropped cars was much greater than any similar operation which he had theretofore experienced"; but this testimony relative to other flying switches in which plaintiff had participated was the very testimony that the Court of Appeals found was improperly admitted because there was no showing that the circumstances, distance, grade, or other conditions of such previous operations were similar to the one in question (R. 411).

While the Court of Appeals did find that it was proper to submit this issue of excessive speed to the jury, it appears to have based such finding on the ground that there was a conflict in the evidence as to the speed at which the switching operation was performed (R. 408). As we have already pointed out, there was no conflict in the testimony as to the speed at which the box cars were traveling when they were cut loose from the switch engine, and this was the only point at which the rate of speed, as bearing on defendant's negligence, would be pertinent. For the purpose of this cross-petition, we have accepted Banning's testimony as to the speed at which the cars came in contact, as well as the rest of his account. Accepting Banning's testimony as true, we submit that there is no testimony from which the conclusion could be drawn that the railroad was negligent in dropping the cars at an excessive speed, but that Banning's testimony is entirely consistent with failure of judgment or negligence on his own part (cross-petitioner's brief, pp. 38-39).

Petitioner (p. 11 of his answer) attempts to develop a question of fact as to the speed of the box car at the cross-

ing, as between the testimony of fireman Hitchingham and flagman Smalley. Hitchingham did not testify as to the speed of the car at the crossing but to the speed of the car at the time it was cut loose from the switch engine (and here he agreed with the plaintiff). Smalley did not testify as to the speed of the car when it was uncoupled because he was several hundred feet away at the crossing. He did testify to the speed at the crossing, but we reiterate that we are not relying on his testimony, which is in conflict with that of the plaintiff, but are accepting plaintiff's own statement as to the speed at the crossing.

ADDITIONAL COMMENTS

Plaintiff (petitioner) has created some confusion by attempting to inject a discussion of the so-called "mud issue" into his answer (pp. 11-13 thereof) to the cross-petition, which latter involves only the issue of alleged excessive speed. This subject he also attempts to argue in his reply to cross-petitioner's answer to the original petition. In addition to this, he states (p. 14 of his answer to the cross-petition) that "on page 25 of its brief in support of its cross-petition for certiorari, cross-petitioner vagrantly raises the question of the excessiveness of the verdict." Reference, however, to the printed document heretofore filed by us will show that we mention briefly the matter of the claim made by us upon the appeal to the Court of Appeals that the verdict of the jury was grossly excessive in that part of such document that constituted our brief in reply to plaintiff's original petition and not in support of our cross-petition.

In order to avoid further confusion, we segregate our comments in respect of these subjects under the above heading as follows:

Petitioner argues that the Court of Appeals reversed the judgment because the trial court used the phrase "in two respects" instead of the phrase "in this respect" (see p. 13 of his answer and p. 7 of his reply). A fair reading of the opinion of the Court of Appeals (R. 406-412) will show clearly that that court was not guilty of such legal legerdemain. The following phrase quoted from that opinion will suffice to show why that court found that this issue should not have been submitted to the jury:

> "The fact that appellee got mud on his boots while working during or after a rain is not in our opinion any evidence of failure on the part of the carrier to furnish the appellee a safe place in which to work. Nor does the evidence show in any way that appellee was required to work thereafter without being afforded an opportunity to counteract any danger resulting therefrom. He had ample opportunity while waiting on the engine to clean his boots of mud. He was where he could talk to the engineer, and the conditions were such that he could have requested and received any additional time needed for freeing his boots of mud if they needed such cleaning. It was some time later and in an entirely different location when the accident happened. The two incidents are entirely separate and distinct" (R. 410).

We will not here repeat our argument on this point (pp. 11-25 of respondent's brief in reply to petition for writ of certiorari), showing clearly not only that there was no evidence of negligence on the part of the railroad in this respect, but that according to plaintiff's own testimony, the mud on his boots, if any, had absolutely nothing to do with the accident.

As to the matter of damages which petitioner mentions on page 14 of his answer, we merely pointed out (p. 25

of our brief in reply to the original petition) that the Court of Appeals had not actually passed on that question, and that we wished only to preserve the point.

That petitioner has wholly misconceived the rule whereby the submission of one unsupported issue renders a general verdict bad, is evidenced by his continued citation of such cases as the Bigelow case (p. 2 of petitioner's reply to respondent's answer). As we have already pointed out (pp. 16-18 of our original brief), such cases have no bearing on this question.

In answer to our position that petitioner's failure to question certain rulings of the Court of Appeals is fatal to his petition (pp. 7-10 of our original brief), the petitioner asserts in his reply (pp. 5-7) that these various rulings of the Court of Appeals were merely dictum.

Inasmuch as these three rulings each constituted an adjudication on a point within the issues of the case, and are clearly intended to be binding on the lower court, they certainly do not constitute *dicta,* see *21 C. J. S.*, p. 314. Every one of these three rulings was obviously on a material point, for example, the ruling by the Court of Appeals that Banning should not have been allowed to compare the speed with which other switchings had been made with that in the present case because no foundation had been laid for such comparison. That this is very material is evident from the fact that plaintiff relies upon this evidence in support of his claim that the speed was excessive.

On pages 5-6 of petitioner's reply, he makes the claim, in respect to Banning's testimony about the speed at the point of impact, that "the gist of the testimony complained of was in the record without objection." On direct examination defendant's counsel repeatedly objected

to questions of this kind and was overruled by the court (R. 59-60). We submit that after such repeated objections and ruling, there was no further obligation on defendant's counsel during the trial to continue such objections when the same question was asked by the court; and it is to the latter question, that is, by the court (R. 96), that petitioner refers to in his reply.

It should be noted that the quotation made by petitioner (see page 5 of his reply) of the court's question and petitioner's answer thereto from page 96 of the record is not correct. Petitioner therein quotes as a part of Banning's answer as follows:

> "I had been in a similar operation and situation 15-20 times before when we made drops of that sort; after the contact my hands and feet were jerked loose, I knew I was falling but there was nothing to grab there after I was jerked loose."

A reference to page 96 of the record shows that actually plaintiff's answer to the court's question did not contain this quoted statement, but consisted solely of the following:

> "A. Yes, sir. There was a great contact. They came together with a greater force than I ever experienced on before."

Thereupon the colloquy between the court and plaintiff (petitioner) continued as follows:

> "The Court: I don't know whether you were asked that or not, but can you tell us about how many times during the time that you were employed by the defendant in the capacity of brakeman or switchman have you been in a situation comparable to the one you described in this case, standing on the platform and gripping the brake wheel with both

hands when shunting or when a fly switch was being made?

"A. Well, as I said yesterday, there was about 15 or 20 times that we had made drops of that sort, where practically the same procedure had been operated in dropping those cars.

"The Court: You testified yesterday, I believe, that after the contact, you just felt yourself going down. Is that what you said?

"A. After my hands and feet were jerked loose, I knew I was falling but there was nothing to grab there after I was jerked loose.

"The Court: All right."

It will be noted from the above that there is no statement by the witness to the effect quoted in petitioner's reply, namely, that he "had been in a *similar operation and situation* 15-20 times before when we made drops of that sort * * *" (italics ours). On the contrary, the court's questions were directed to the similarity in regard to plaintiff's stance and grip on the brake platform.

A reference to plaintiff's direct examination (R. 58-59) will show that while plaintiff testified that he had engaged in flying or drop switches on some 25 or 30 other occasions, he did not testify as to any similarity of situation, circumstances, grade, distance, etc. On the contrary, the cross-examination of plaintiff (R. 74-75) shows that the circumstances pertaining to the other drop switches in which he had had experience were, in fact, different from those in the present case. He had not made any in this particular vicinity, and most of those he had made were in Ohio, and he himself states that "on the road to Springfield there are several stub tracks that the cars have to be dropped to get them in there because the engine is heading south and the cars are on the north end of the engine"; and while the general operation of dropping the

box car was similar, he says in answer to the specific question as to the distance involved on these other occasions (R. 75):

> "A. A lot of times there wouldn't be any cars to couple on. Lots of times we were setting off loaded cars or empty cars to be loaded.
>
> "Q. Did you apply the brakes?
>
> "A. Yes, and then the engine would shove them on down and place them before the warehouse doors or granaries or anywhere else they might go.
>
> "Q. Can you name any other place you had done the same thing?
>
> "A. Hainler, Ohio; different places down there, Ottawa, Ohio. There is just one switch in Ottawa and that is true of the other places I mentioned. Also in Lima, Ohio. It is just this one point there where I have made the drop track, yes."

One looks in vain for any testimony in regard to any other switching of this sort performed by petitioner where the distance, grade, etc. were substantially similar. The required speed at which a drop switch might be made where (as in the present case) the distance to be travelled by the cars switched is several hundred feet and where the track at the beginning is slightly up-grade, if anything, would obviously be much greater than that required for dropping cars into a side track for a distance of perhaps a few feet and where the cars were not to be coupled on to any standing train.

The above illustrates quite plainly the materiality of the ruling of the Court of Appeals that the proper foundation for comparison had not been laid. In fact, it demonstrates that plaintiff (on cross-examination) was absolutely unable to lay any such foundation.

We have felt obliged to call attention to the foregoing, but we shall not here be drawn into an argument in

respect of the propriety of the various rulings of the Court of Appeals in regard to the three errors now under discussion, for as we pointed out in our original brief (p. 10), Supreme Court rule 38-(2) provides that "only the questions specifically brought forward by the petition for writ of certiorari will be considered." These questions were not mentioned in Banning's petition for writ of certiorari, and respondent, in not arguing the merits of these rulings, has relied upon this rule.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied and the cross-petition for a writ of certiorari should be granted.

CLIFFORD B. LONGLEY,
HENRY C. BOGLE,
HAROLD A. JOHNSON,
Counsel for Cross-Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 771 & 93

LESTER E. BANNING,
Petitioner and Cross-Respondent,

vs.

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner.

ANSWER OF LESTER E. BANNING, PETITIONER, TO RESPONDENT'S CROSS-PETITION.

LLOYD T. BAILEY,
325 Thompson Bldg.,
Hot Springs, Arkansas.

MICHAEL H. LYONS,
105 W. Madison Street,
Chicago, Illinois.

HARRISON T. WATSON,
1919 Dime Bldg.,
Detroit 26, Michigan,
Counsel for Petitioner.

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DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner.

ANSWER OF LESTER E. BANNING, PETITIONER, TO RESPONDENT'S CROSS-PETITION.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Lester E. Banning, filed his petition praying that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit, entered on April 5, 1949. Respondent, Detroit, Toledo & Ironton Railroad Company, filed its cross-petition also asking that a writ of certiorari be granted. This brief is addressed to that petition.

Petitioner, respondent and cross-petitioner all rely upon the same section of the Code to invoke jurisdiction of this Court.

The matter involved is fully set forth in the briefs of the petitioner and cross-petitioner.

Question Presented By Cross-Petitioner.

The sole question presented by the cross-petition of respondent is: "Whether there was sufficient evidence to warrant the issue of excessive speed to go to the jury".

Statement of Case:

We accept cross-petitioner's statement of the facts but for the purpose of supplying certain inefficiencies and clarifying some inaccuracies that we believe exist in cross-petitioner's statement, we supplant the same in the nature of a limited statement of facts.

A Limited Statement of Facts.

Plaintiff testified (R. 68) that from the time he took his position on the braking platform and began applying the brakes he continued to apply them up to the point of the impact; he continued a constant application of brakes during the interval. He testified (R. 34) that he performed a coupling operation when the two cars were picked up on the distillery tracks; that he had to dismount and get on the road bed; there was a thin layer of mud on it; about 2 inches deep; that he had to walk in and around those cars. Plaintiff had on new boots; (R. 53) they were muddy when he mounted the braking platform. The braking platform was made of steel, jutting out from the end of the car about 8 inches and it

was about 2 feet long running across the end of the car; that was to stand on while applying the brakes on the car (R. 46). Plaintiff was standing on the platform with his lantern in his left hand and his two hands turning the brake wheel. He was tightening the brakes to slow the cars down at the time of the accident (R. 47).

Plaintiff's lantern was admitted in evidence as plaintiff's Exhibit 3 (R. 94).

Banning had worked for cross-petitioner, Detroit, Toledo & Ironton Railroad Company as a brakeman from July 19, 1945, (R. 21) to September 23, 1946, when injured; seven days per week except a day off now and then (R. 22). He was 32 years of age and his expectancy was 33.21 years (R. 68); married and has a boy 10 years old and a girl 10 months old (R. 21). Banning, on being interrogated by the Court (without objection by defendant railroad company) testified: (R. 96) he had both hands on the brake wheel with the lantern in his left hand gripping the wheel, (R. 96) at the time of the contact between the car he was on and the rest of the train, with his feet firmly on the brake platform. That he had been in that situation before at similar work; that there was no difference in being in this situation at this time and in a similar situation at other times with reference to stance or grip.

The Court (R. 96):

> "What difference was there with reference to the contact, if any? You understand what I mean by 'contact'. Your car going together with another car."

Answer:

> "Yes sir. There was a great contact. They came together with a greater force than I ever experienced on before. I had been in a similar operation and situation 15—20 times before when we made drops

of that sort; after the contact my hands and feet were jerked loose, I knew I was falling but there was nothing to grab there after I was jerked loose."

And at (R. 97) plaintiff testified that there was about three feet separating the car he was riding and the gondola; that he travelled through the air after the contact around seven feet from the brake platform to where he fell on the gondola; that it was about 11 feet from the braking platform to the ground (R. 97, 98); that he bounced off the gondola car and landed on his back on the ground on the end of railroad ties that protruded an inch or two above the ground level (R. 63).

Carl F. Ruetz, the engineer in charge of the train (a witness called by defendant) testified on cross examination (R. 258): it wasn't necessary to recouple those two cars that had been switched in; they were coupled.

While engineer Ruetz, was testifying, on direct examination, the following occurred (R. 254):

Q. What did you see when you came up there?

A. Mr. Banning was lying on the ground.

Q. Did you hear him say anything? A. I asked him what happened.

Q. What did he say? A. He said,—I didn't ask him just what happened in that way, I says, "What happened, did you get knocked off?" He says, "No, I slipped and fell."

On cross examination witness Ruetz (R. 262) testified:

Q. You had a good reason to ask him if he had been knocked off, didn't you? A. Yes.

Defendant's witness, Ruetz, further testified that he saw Banning's lantern fall (R. 252). "Well, when I seen the lantern fall, I would approximately say it was eight feet in the air when I seen it going towards the ground,"

• • • "• • • and then, oh, I would say approximately a few seconds after I seen the lantern go to the ground I seen the lantern move back and forth on the ground for me to stop." (R. 253) "I said to the conductor there was something wrong." "I went where he was lying on the ground." It was then that engineer Ruetz asked the question "Did you get knocked off?"

Witness Toombs.

N. I. Toombs, conductor for defendant railroad company (called by defendant) testified: We picked up 8 or 9 cars at the stone quarry; some were loaded. I think they were all gondolas, and shoved them on the main line (R. 211). We left them about 4 cars North of Harrison Avenue (R. 213). It had been raining all the afternoon and was raining at the time of Banning's accident to a lesser degree (R. 222). The two cars involved in the flying switch were loads (R. 224). Each empty car would weigh about 20 tons and loaded from 60 to 70 tons (R. 225). Cars on the main line were about 175 feet North of Harrison Avenue (R. 230). The total height of a box car is 15 feet (R. 231). I saw Banning's lantern fall 10 feet to the ground (R. 232); when I saw the light fall and saw a stop signal from the ground I went to Mr. Banning; he was lying with his feet at an angle of about 45° from the rail; his feet were about 3-4 feet from the rail (R. 233).

Witness Smalley.

Harold Dean Smalley, brakeman for the defendant railroad company (called by defendant) testified: The duty I was to perform in connection with the flying switch was flagging Harrison Avenue crossing. I was standing in the middle of Harrison Avenue (R. 238). On direct

examination, in answer to the question "do you recall seeing them (the two cars) as they passed you on Harrison Avenue?" "I recall just a little bit of them as I was looking both ways on Harrison Avenue. My duty there was with reference to the traffic" and to the question "Do you know how fast a man walks on the average?", Answer: "3-4 miles an hour". In his opinion they travelled about 3-4 miles an hour and he heard no sound when the cars coupled with the string on the main line (R. 239). That he went over to see Banning after the accident. He was down by the cars where they coupled. He was sitting there on the ground. He was moved and sat on a grain scoop (R. 240).

Williard E. Hitchington.

Williard E. Hitchington, fireman, (called on behalf of defendant) testified (R. 263):

He was on the engine at the time the drop switch was made; the switch engine was proceeding, before the accident southward along the main line pushing 2 box cars and drawing up to a certain point from 8 other cars, mostly gondolas; we left the gondolas on the main line with brakes set (R. 264); and we proceeded to make the drop. We got the 2 cars going about 12 miles per hour and then the engineer gave the slack so the man could cut the cars off and the engine ran into the distillery track and the cars went down the main line track (R. 265). I went to where Banning was lying. He was about 5 feet from the track on his back; Mr. Smalley and I picked him up. He was in pain and sat on a grain scoop.

ARGUMENT.

The Evidence of Excessive Speed and the Violent Collision Was Sufficient to Take the Case to the Jury.

We submit that the trial court in his memorandum of grounds for denial of motion for new trial (R. 385-388) clearly stated the rule of law governing the case, and we quote:

> "The case was submitted to the jury on the issues of defendant's negligence in failing to furnish plaintiff with a reasonably safe place to work, the excessive speed at which the two cars were dropped by the engine, and the plaintiff's contributory negligence in failing to remove the mud from his shoes before the switching operation during which the accident occurred.
>
> Defendant claims that there is a lack of evidence of any negligence on its part which was the proximate cause of the accident; that the operation of dropping the two cars was an ordinary maneuver. The plaintiff testified, however, that the speed of the two dropped cars was much greater than any similar operation which he had theretofore experienced; that it was in fact between six and seven miles an hour. (*At the time of the collision* (R. 58) the italics are ours). Plaintiff theretofore had ample opportunity to acquaint himself with the speed of moving vehicles, both as a driver of an automobile and as having been engaged previously in similar switching operations. It is my opinion that such speed alone, if plaintiff's testimony be believed, is of itself, sufficient to make it a question for the jury's consideration, notwithstanding the testimony of some of defendant's witnesses that the speed was between three and four miles an hour. When the speed of six or seven miles an hour is taken together with the weather conditions prevail-

ing, such as a misting rain, plaintiff's muddy shoes from working on muddy ground, the small braking platform on which plaintiff had to brace himself in his operation of braking the speed of the cars, a wet braking platform, not necessarily because of plaintiff's muddy shoes but because of the rain, and the insufficient opportunity to slow the speed of the rolling cars in the distance they traveled—all these elements are peculiarly questions for the jury."

In *Bailey* v. *Central Vermont Railway,* 319 U. S. 350, the Court said (p. 354):

> "The right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence.' *Jacoby* v. *New York City,* 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern system of workmen's compensation. But however inefficient and backward it may be it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In a similar situation *Norfolk & Western Railway Co.* v. *Fraley,* C.C.A. 6th 69 F. 2d 775, the testimony was that when the cars were uncoupled from the engine they were moving about as fast as one could walk and upgrade, but after the brakes were set the speed may have been a little reduced and that the cars were moving four or five miles an hour and stopped "awful quick", there the Court said: "This appears quite sufficient if believed to show a

very abrupt and an extraordinary jerk of the car on which Fraley stood".

The Supreme Court also said, in a late case: "And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury". *Ellis* v. *Union Pacific Railway Co.*, 329 U. S. 649, 653.

An interesting case involving the speed of shunted cars is *Terminal Railway Association of St. Louis* v. *Schorb*, C.C.A., 151 F. 2d 361, where it was said (p. 364):

> "Defendant, however, had the duty, imposed or preserved by the Federal Employers' Liability Act, to answer to plaintiff for negligence of defendant's employees. This duty existed regardless of the reason its employees might assign for limiting speed of cars in a switching operation. Whatever may have been the reason for the custom of limiting speed of cars on making a flying switch, defendant could not with impunity shift the cars at any rate of speed desired in disregard of life and limb of its employees. If the speed of the shunted cars was so excessive as to constitute negligence, and the excessive speed was the proximate cause of the injury, plaintiff is entitled to recover. The test of defendant's negligence was not custom or usage, but what reasonable prudence would require under the circumstances. *Dunagan* v. *Appalachian Power Co.*, 4th Circuit, 33 F. 2d 876, 68 A. L. R. 1393."

In a very recent case, *Henwood* v. *Coburn*, 165 F. 2d 418,423, the Eighth Circuit Court of Appeals said:

> "• • • there is to be borne in mind also the apparent emphasis in the recent decisions of the Supreme Court that questions of negligence and proximate cause under the Federal Employers' Liability Act are generally for the jury; that the field of jury inference is a broad one and only requires a rational

possibility on the facts; and that a verdict is not necessarily one of speculation and conjecture because inferences are arrived at by the application of general experience and common reaction to the evidentiary situation. (Cases cited.) And also, as previously suggested, if an employer's negligence is in any part the efficient cause of an employee's injury, the employer is liable under the Act. (*Fleming* v. *Husted*, 8 Cir., 164 F. 2d 65, 67, 68, 'It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act.' *Grand Trunk Western R. Co.* v. *Lindsay*, 233 U. S. 42, 47, 34 S. Ct. 581, 582, 58 L. Ed. 838, Ann. Cas. 1914C, 168, approving a trial court's instruction."

"In the Court's opinion, there was substantial evidence on which the jury's verdict could be based. Plaintiff's testimony is not unbelievable. The fact that reasonable men might differ as to result makes it all the more a question for the jury."

The United States Court of Appeals for the Sixth Circuit, in the case at bar, said (R. 409):

"Whether the collision contact was the result of excessive speed or caused by Banning's failure to properly use the braking mechanism presented a disputed question of fact. The District Judge was correct in submitting this issue to the jury." Citing: *Bailey* v. *Central Vermont Railway Co.*, 319 U. S. 350; *Lavender* v. *Kurn* 327 U. S. 645; *Ellis* v. *Union* P. R. Co., 329 U. S. 649; *Norfolk & W. Ry.* v. *Fraley*, 69 Fed. (2) 775, C. A. 6."

The following are the undisputed facts:

That while the "flying switch" or "drop switch" was being made at the time the engine was uncoupled from the two cars so that it could run into the distillery track and allow the two cars to follow down the main track on their momentum, the two cars were going at the rate of at least 11 miles an hour.

Petitioner's testimony (page 3 of this brief) is corroborated by the testimony of fireman Hitchington (page 6 of this brief) and is questioned only by flagman Smalley who stated he saw a little of the cars (pages 5-6 of this brief). He was watching the traffic on Harrison Avenue both ways. This fact was not disputed by the engineer or conductor.

Plaintiff's testimony that there was a terrific collision when the car he was riding contacted the standing cars is not disputed. Only flagman Smalley testified that he did not hear a collision.

That the cars upon which plaintiff was riding came in contact with the standing cars on the main line when going at a speed of six to seven miles an hour. This testimony was controverted, but only indirectly, by the testimony of flagman Smalley.

That the two cars upon which plaintiff was riding weighed 120-140 tons and came in contact with at least eight cars loaded with gravel with brakes set, weighing at least 520 tons.

That the two cars upon which petitioner was riding contacted the eight standing cars and made an automatic coupling.

That from the time petitioner was able to reach the braking platform and adjust the cam after uncoupling the engine and climbing up the ladder of the car to the braking platform he was at Harrison Avenue the cars were moving at about 11 miles an hour when the south end of the standing cars on the main line was but 200 feet distant; the main track was level over that distance.

That he had walked in two inches of slushy slippery mud along the back track and that there was mud on his boots at the time he mounted the brake platform.

That the brake platform projected eight inches out from the car and was two feet long and made of metal and was wet.

That when the collision occurred plaintiff was propelled from the platform through the air three feet outward and four feet downward and landed on the end of a gondola loaded with gravel and bounced from there approximately eight feet downward and three-five feet outward landing on the right-of-way with his feet toward the track and three-five feet distant therefrom.

That he suffered a compression fracture of four of his vertebrae.

That plaintiff's "Exhibit 3" (the lantern carried by petitioner at the time of his injury), is constructed with a strong metal cage surrounding the lamp; the bottom of this cage is circular and constructed of a heavy wire-like metal of such tensile strength that it cannot be pulled back in shape by the force and strength of one's hands. (In the event this cause is transferred to the summary calendar, we will ask that the exhibit be forwarded for this Court's examination.)

The condition of the lantern is mute and unescapable evidence of the existence of terrific force and violence. It corroborates plaintiff in his statement that the cars came together with terrific impact. In its opinion reversing the District Court, the Court of Appeals (R. 409) stated:

> "Whether the crash contact was a result of excessive speed or caused by Banning's failure to properly use the braking mechanism presented a disputed question of fact. The District Judge was correct in submitting this issue to the jury." (Citing cases.)

In this opinion the Court of Appeals said, in substance, that had the plaintiff charged in his complaint that the defendant failed to furnish him a safe place in which to work, IN THIS RESPECT: first, that he was directed and required to work under muddy conditions, and, second, that the defendant dropped the car at an excessive speed, instead of as stated by the District Judge, "defendant failed to furnish plaintiff a safe place in which to work, IN TWO RESPECTS; first, that he was directed to work under muddy conditions and, second, that the car was dropped at an excessive speed," then the plaintiff could have recovered and the Court would not have reversed the judgment. In other words, the Court of Appeals saw fit to reverse the judgment herein because of the use of the words IN TWO RESPECTS instead of the words IN THIS RESPECT.

The Court of Appeals reversed this judgment on the turn of, actually, one word: for the use of the word "two" instead of the use of the word "this". In reaching this conclusion the Court of Appeals necessarily had to wholly disregard the fact that plaintiff was compelled to work in thin, slushy and slippery mud on the back track; that it was a wet night; that the braking platform was small and wet and that plaintiff's boots were covered with mud at the time he mounted the braking platform. This evidence was wholly undisputed, and in disregard of the fact that along the main track the right-of-way was paved with gravel and cinders and was not muddy; further, there was no explanation by defendant why the right-of-way and pathway to be used by petitioner on the back track could not have been in a condition comparable to the right-of-way and pathway along the main track.

In view of the evidence there was ample grounds for the jury to reasonably infer that the slippery mud on petitioner's boots could have contributed to petitioner's dislodgement from the braking platform and his injury.

Jury's verdict was not excessive.

In its conclusion on page 25 of its brief in support of its cross petition for certiorari, cross petitioner vagrantly raises the question of the excessiveness of the verdict. The evidence in regard to plaintiff's injuries shows that he was 32 years of age, had a life expectancy of something over 33 years, and it was stipulated that he earned during the year previous to the accident $3550.00 (R. 166).

The evidence showed that there was a compression fracture of the twelfth, eleventh and eighth dorsal vertebrae, with a narrowing of the inter-vertebral space between the tenth and eleventh dorsal vertebrae; a destruction of the inter-vertebral disc between the tenth and eleventh, the eleventh and twelfth vertebrae, and between the 1st and 12th dorsal at which point the intervertebral disc was protruding into the spinal canal, obstructing about fifty per cent of the canal. (These conditions can be seen by plaintiff's exhibits 1 to 26, which, if the opportunity permits, we will present to this court for its examination.) Dr. Arthur H. Conley, whose qualifications are set out on page 135 of the record, testified (R. 145) that in his opinion the condition would become progressively worse and that the outcome of corrective operations was uncertain. The doctor's testimony in this respect was corroborated by the testimony of Dr. Charles K. Barnes (R. 107) who testified (R. 109) petitioner's condition had gotten worse since the time he first saw him. "That there is more wedging than there was previously * * *." Dr. Barnes examined petitioner's

X-rays taken on the 2nd day of December, 1946 and his X-rays taken on the 12th day of September, 1947 (R. 108).

We submit that the question of the amount of damages was for the jury. We are of the opinion that this question is not in the case but in the event the Court feels differently, we ask that the Court consider the cases of *Texas & Pacific Ry. Co.* v. *Behymer,* 189 U. S. 468-469; *New York, Lake Erie & Western R. R.* v. *Winter,* 143 U. S. 60, 75; *Lincoln* v. *Power,* 151 U. S. 436; *Scott* v. *Baltimore & O. Ry. Co.,* C.C.A., 3rd Circuit, 1945, 151 F. 2d 61, 64.

The verdict certainly was not excessive, in fact, in the light of the proof, the gravity of the injuries and the present value of the dollar, it was surprisingly small.

Conclusion.

We respectfully submit that under the evidence and rules of law heretofore pronounced by this Court the question of cross-petitioner's negligence and petitioner's contributory negligence, if any, was properly submitted to the jury; that the verdict of the jury was amply supported by the evidence as was the judgment of the District Court and that said judgment should be affirmed.

For the reasons above set forth petitioner respectfully submits that the cross-petition of Detroit, Toledo & Ironton Railway Company for a writ of certiorari should be denied.

Respectfully submitted,

Lloyd T. Bailey,
Michael H. Lyons,
Harrison T. Watson,
Counsel for Appellee.